NAVAL WAR COLLEGE

INTERNATIONAL LAW TOPICS AND DISCUSSIONS

1905

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PREFACE.

The Navy Department, as has been the practice in recent years, assembled at the Naval War College on June 1, 1905, a conference of officers, a majority of whom were of high rank and long experience, to occupy four months in the discussion of the battle tactics and strategy of the fleet, and of those unsettled questions of international law which at times have seemed to threaten universal war.

The topics considered in this volume are of vital interest, and it is desirable to make clear the manner in which the work was performed. They were formulated before the opening of the conference by the lecturer, Mr. George Grafton Wilson, professor in Brown University, in consultation with the president and staff of the War College. The officers were divided into committees when the conference assembled, and at stated intervals the committees submitted reports upon the several topics; the reports were then fully and freely discussed in a general conference participated in by the lecturer, the president and staff of the college, and all the officers in attendance. The conclusions published are those accepted in the general conference and may be fairly held to be without bias, since it is evident that in the future the United States may be affected either as neutral or as belligerent, and since the topics do not relate to questions pending.

The field is wide and the time limited, but the work is justified, if besides increasing our knowledge it has contributed in any degree to the formulation of agreements tending to avert or ameliorate war.

C. S. Sperry,
Captain, U. S. Navy, President.

Naval War College,
Newport, R. I., February 23, 1906.

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INTERNATIONAL LAW TOPICS AND DISCUSSIONS.

Topic I.

It was voted at the conference at The Hague in 1899 that

"The conference expresses the wish that the proposal, which contemplates the declaration of the inviolability of private property in naval warfare, may be referred to a subsequent conference for consideration."

In view of the above, what regulations should be made in regard to private property at sea in time of war?

CONCLUSION.

The following regulations should be made in regard to private property at sea in time of war:

Innocent neutral goods and ships are not liable to capture.

Innocent enemy goods and ships, except vessels propelled by machinery and capable of keeping the high seas, are not liable to capture.

DISCUSSION AND NOTES.

Attitude of the United States.—Franklin very early expressed a general principle for which the United States has stood. He said, in a letter to Messrs. D. Wendorp and Thomas Hope Heyhger:

PASSY, *8 June, 1781.*

There are three employments which I wish the law of nations would protect, so that they should never be molested or interrupted by enemies even in time of war. I mean farmers, fishermen, and merchants, because their employments are not only innocent, but are for common subsistence and benefit of the human species in general.

As men grow more enlightened, we may hope this will in time be the case. Till then we must submit, as well as we can, to the evils we can not remedy.

Franklin in 1783 sent an article to Richard Oswald, of which he said: "I rather wish than expect that it will be adopted."

ARTICLE.

If war should hereafter arise between Great Britain and the United States, which God forbid, the merchants of either country then residing in the other shall be allowed to remain nine months to collect their debts and settle their affairs, and may depart freely, carrying off all their effects without molestation or hindrance. And all fishermen, all cultivators of the earth, and all artisans or manufacturers unarmed, and inhabiting unfortified towns, villages, or places, who labor for the common subsistence and benefit of mankind and peaceably follow their respective employments, shall be allowed to continue the same, and shall not be molested by the armed force of the enemy in whose power by the events of the war they may happen to fall; but if anything is necessary to be taken from them, for the use of such armed force, the same shall be paid for at a reasonable price. And all merchants or traders with their unarmed vessels employed in commerce, exchanging the products of different places, and thereby rendering the necessaries, conveniences, and comforts of human life more easy to obtain and more general, shall be allowed to pass freely, unmolested. And neither of the powers parties to this treaty shall grant or issue any commission to any private armed vessels empowering them to take or destroy such trading ships or interrupt such commerce. (Sparks, The Works of Franklin, IX, p. 469.)

The first part of this proposed article is now generally recognized as binding throughout the world. States have been more reluctant to adopt the principles in regard to "merchants or traders with their unarmed vessels." The proposition in regard to privateering has become a generally recognized principle.

The United States has uniformly endeavored to obtain the broadest freedom for commerce in time of war.

Exemption from capture has been extended to the following when innocently employed: To

(1) vessels engaged in scientific work and in exploration;
(2) coast-fishing vessels innocently employed;
(3) cartel ships acting within their permitted sphere;
(4) hospital and other Red Cross vessels.

The treaty between the United States and Prussia of 1785, in Article XXIII, provided that—

all merchant and trading vessels employed in exchanging the products of different places, and thereby rendering the necessaries, conveniences, and comforts of human life more easy to be obtained and more general, shall be allowed to pass free and unmolested; and neither of the contracting powers shall grant or issue any commission to any private armed vessels, empowering them to take or destroy such trading vessels or interrupt such commerce. (Treaties and Conventions, 1776–1887, pp. 905–906.)

This provision did not, however, reappear in the treaty of 1799, which took the place of the treaty of 1785, which had expired in 1786 by limitation.

It is evident that Franklin's position was the ideal for which the United States was striving. It was fully recognized that it was yet to be attained.

In a long letter to the minister of foreign affairs of the French Republic, of January 27, 1798, signed by Charles C. Pinckney, J. Marshall, and E. Gerry, occurs the following well-considered statement in regard to the relations of ships and goods:

This principle is to be searched for in the law of nations. That law forms, independent of compact, a rule of action by which the sovereignties of the civilized world consent to be governed. It prescribes what one nation may do without giving just cause of war, and what, of consequence, another may and ought to permit without being considered as having sacrificed its honor, its dignity, or its independence.

What, then, is the doctrine of the law of nations on this subject? Do neutral bottoms of right, and independent of particular compact, protect hostile goods? The question is to be considered on its mere right, uninfluenced by the wishes or the interests of a neutral or belligerent power.

It is a general rule that war gives to a belligerent power a right to seize and confiscate the goods of his enemy. However humanity may deplore the application of this principle there is perhaps no one to which man has more universally assented, or to which jurists have more uniformly agreed. Its theory and its practice have unhappily been maintained in all ages. This right, then, may be exercised on the goods of an enemy wherever found unless opposed by some superior right. It yields by common consent to the superior right of a neutral nation to protect, by virtue of its sovereignty, the goods of either of the belligerent powers found within its jurisdiction. But can this right of protection, admitted to be possessed by every govern-

ment within its mere limits in virtue of its absolute sovereignty, be communicated to a vessel navigating the high seas?

It is supposed that it can not be so communicated, because the ocean being common to all nations no absolute sovereignty can be acquired in it. The rights of all are equal, and must necessarily check, limit, and restrain each other. The superior right, therefore, of absolute sovereignty to protect all property within its own territory ceases to be superior when the property is no longer within its own territory, and may be encountered by the opposing acknowledged right of a belligerent power to seize and confiscate the goods of his enemy. If the belligerent permits the neutral to attempt, without hazard to himself, thus to serve and aid his enemy, yet he does not relinquish the right of defeating that attempt whenever it shall be in his power to defeat it. Thus it is admitted that an armed vessel may stop and search at sea a neutral bottom, and may take out goods which are contraband of war, without giving cause of offense or being supposed in any degree to infringe neutral rights. But this practice could not be permitted within the rivers, harbors, or other places of a neutral where its sovereignty was complete. It follows, then, that the full right of affording protection to all property whatever within its own territory, which is inherent in every government, is not transferred to a vessel navigating the high seas. The right of a belligerent over the goods of his enemy within his reach is as complete as his right over contraband of war; and it seems a position not easily to be refuted that a situation that will not protect the one will not protect the other. A neutral bottom, then, does not, of right, in cases where no compact exists, protect from his enemy the goods of a belligerent power. (Vol. II, American State Papers, Foreign Relations, p. 171.)

The American envoys also affirm that—

The desire of establishing universally the principle that neutral bottoms shall make neutral goods is, perhaps, felt by no nation on earth more strongly than by the United States. Perhaps no nation is more deeply interested in its establishment. It is an object they keep in view, and which, if not forced by violence to abandon it, they will pursue in such manner as their own judgment may dictate as being best calculated to attain it; but the wish to establish a principle is essentially different from a determination that it is already established. The interests of the United States could not fail to produce the wish; their duty forbid them to indulge it when deciding on a mere right. However solicitous America might be to pursue all proper means, tending to obtain for this principle the assent of all or any of the maritime powers of Europe, she never conceived the idea of obtaining that consent by force. (Ibid., p. 172.)

President Monroe's message of December 2, 1823, commenting on the position taken by France in the recent war with Spain, states that instructions have been given to the

United States ministers abroad to make proposals to their respective governments which should look to "the abolition of private war on the sea." The same attitude was also maintained in the message of December 7, 1824. No international agreement was reached, however.

In the message of December 4, 1854, President Pierce, after considerable discussion of the rights of property at sea, says:

> Should the leading powers of Europe concur in proposing as a rule of international law to exempt private property on the ocean from seizure by public armed cruisers as well as by privateers, the United States will readily meet them upon that broad ground.

The treaty of the United States with Russia, negotiated by Secretary W. L. Marcy in 1854 and still in force, in Article I provides:

> The two High Contracting Parties recognise as permanent and immutable the following principles, to wit:
>
> 1st. That free ships make free goods, that is to say, that the effects or goods belonging to subjects or citizens of a Power or State at war are free from capture and confiscation when found on board of neutral vessels, with the exception of articles contraband of war.
>
> 2d. That the property of neutrals on board an enemy's vessel is not subject to confiscation unless the same be contraband of war. They engage to apply these principles to the commerce and navigation of all such Powers and States as shall consent to adopt them on their part as permanent and immutable.

To the proposition that the United States accede to the Declaration of Paris in 1856, President Pierce, in his message of December 2, 1856, states that the Government is desirous to secure "the immunity of private property on the ocean from hostile capture. To effect this object, it is proposed to add to the declaration that 'privateering is and remains abolished' the following amendment:

> and that the private property of subjects and citizens of a belligerent on the high seas shall be exempt from seizure by public armed vessels of the other belligerent except it be contraband."

This proposition was at that time favorably received by several States. Italy, Prussia, and Russia were prepared to accede to the wish of the United States. Some of the leaders in France were similarly inclined. Great Britain was, however, unwilling to give assent.

The following action was recently taken in the United States:

Resolved by the Senate and House of Representatives in the United States of America in Congress assembled, That it is the sense of the Congress of the United States that it is desirable, in the interest of uniformity of action by the maritime States of the world in time of war that the President endeavor to bring about an understanding among the principal maritime powers with a view of incorporating into the permanent law of civilized nations the principle of the exemption of all private property at sea, not contraband of war, from capture or destruction by belligerents.

Approved April 28, 1904.

The position of the United States in the exemption of private property at sea in time of war is not based on the consideration advanced in certain States, viz, that unless private property is exempt the State may be cut off from supplies. The United States' population could subsist without foreign commerce for a considerable time with little inconvenience.

Attitude of other powers.—In the war of 1866 Austria, Italy, and Prussia adopted the principle of immunity of private property at sea. The same principle was not adopted in the Franco-Prussian war of 1870, though Prussia was inclined to urge it on France. The action of Italy in 1866 was in accord with the provisions of her merchant maritime code of 1865, which provided that in time of war enemy property on the sea, except contraband, was inviolable. There have also been certain instances, as in the Chinese troubles of 1860, where exemptions have been made on grounds of expediency. Article XII of the treaty between the United States and Italy of February 26, 1871, provides that—

The High Contracting Parties agree that in the unfortunate event of a war between them the private property of their respective citizens and subjects, with the exception of contraband of war, shall be exempt from capture or seizure on the high seas or elsewhere by the armed vessels or by the military forces of either party, it being understood that this exemption shall not extend to vessels and their cargoes which may attempt to enter a port blockaded by the naval forces of either party. (Compilation of Treaties in Force, 1778–1904, p. 453.)

These are some of the main cases in which the principle of immunity of enemy private property at sea in time of war has been adopted in practice or treaty.

Neither practice or treaty precedent offer sufficient basis for regarding the principle as in any sense a recognized one.

Opinions on exemption.—The Institute of International Law in its session of 1877 declared that "Private property, whether neutral or enemy, sailing under enemy flag or neutral flag, is inviolable."

In a letter of Professor Holland, of Oxford, quoted at the meeting of the International Law Association in 1900, the following statement is made:

> The question of immunity seems to me to be rather one for politicians and shipowners than for lawyers. It is probable that immunity would now be in the interest of Great Britain, but, if so, the continental Governments, whatever may be continental legal opinion, are not likely to pledge themselves to it, and, even if they did enter into a general convention to that effect could hardly be relied upon to stand by their bargain. I doubt the expediency of making treaties about lines of conduct which may affect national existence. The strain upon them is likely to be too great for endurance, and one is afraid that one's country might be lulled into security by a paper contract which might be torn up on the outbreak of hostilities.

Sir John Macdonell, in writing of England's position in 1904, said:

> It appears to me that more and more the interests of England become those of a neutral state and that it would be to her advantage on the whole that private property on sea were exempt from capture * * *. It is is inconceivable that the destruction of commerce at sea of any rival could determine in our favor the issue of a war in which we were engaged; while the systematic harrying of our trade might in certain circumstances be a serious blow to England. (Nineteenth Century, Nov., 1904, p. 699.)

In another place the same writer, treating of private property at sea, says:

> For all concerned, but especially for England, which stands to lose most, it would probably have been well if the offer held out last century by Jefferson and Franklin, and repeated by the United States in 1856 and 1870, to exempt such property from capture had been adopted. (Journal Royal United Service Institution, XLII, pt. 2, p. 796.)

In Atlay's recent edition of Wheaton's International Law, a position opposed to exemption of capture of private property on the high seas is assumed. The arguments are stated as follows:

The indiscriminate seizure of private property on land would cause the most terrible hardship without conferring any corresponding advantage on the invader. It can not be effected without in some measure relaxing military discipline and is sure to be accompanied by violence and outrage. On the other hand, the capture of merchant vessels is usually a bloodless act, most merchant vessels being incapable of resisting a ship of war. Again, property on land consists of endless varieties, much of it being absolutely useless for any hostile purpose, while property at sea is almost always purely merchandise and thus is part of the enemy's strength. It is, moreover, embarked voluntarily and with a knowledge of the risk incurred, and its loss can be covered by insurance. An invader on land can levy contributions or a war indemnity from a vanquished country; he can occupy part of its territory and appropriate its rates and taxes, and by these and other methods he can enfeeble the enemy and terminate the war. But in a maritime war a belligerent has none of these resources, and his main instrument of coercion is crippling his enemy's commerce. If war at sea were to be restricted to the naval forces, a country possessing a powerful fleet would have very little advantage over a country with a small fleet or with none at all. If the enemy kept his ships of war in port, a powerful fleet, being unable to operate against commerce, would have little or no occupation. The United States proposed to add to the declaration of Paris a clause exempting all private property on the high seas from seizure by public armed vessels of the other belligerent, except it be contraband, but this proposal was not acceded to. Nor does it seem likely, for the reasons stated above, that maritime nations will forego their rights in this respect. (Paragraph 355 b).

Edmund Robertson (late civil lord of the Admiralty) summarizes the recent report of the Royal Commission on Supply of Food and Raw Material in Time of War, as follows:

(1) The commission has ascertained the extent of our dependence for supplies of food and raw material on foreign sources. The prime fact is that we import four-fifths of the wheat we consume and that our stocks on hand may run down so low as seven weeks' supply.

(2) The commission was not instructed to deal with exports, but it is true, both of our exports and our imports, that on the sea, when they are the property of British subjects and are carried in British ships, they are liable to seizure and confiscation by an enemy in time of war.

(3) It is quite clear that this condition of things necessitates what is called a strong fleet, and that, even with a strong fleet, trade will be to some extent endangered, supplies to some extent interrupted, prices to some extent increased. To what extent the commission was divided in opinion.

(4) The commission accordingly, or rather various sections of the commission, have suggested various remedies all of which would involve serious public expenditure. But the commission has not found it within its province, as understood by the majority, to deal in any way with the rule of international law, which the report declares to be the cause of all the apprehended dangers.

(5) This rule has been retained in international law mainly by the refusal of Great Britain to consent to its abolition at a time when her economical and even her naval position in relation to other nations was quite unlike what it is now.

(6) The rule has been gradually falling into discredit—partially in this country, generally in most others.

(7) There is good ground for thinking that the right of capture is of no great value to us, and also that it will not, in fact, be exercised to any great extent until the closing stages of the war.

(8) There is also ground for thinking that, apart from the mere question of supplies, the rule, taken in connection with the declaration of Paris, must have the effect of transferring a large portion of our vast carrying trade to neutral flags.

(9) At this very moment the rule has been formally challenged once more by the United States Government in its proposals for the new Hague conference.

General conclusions as to policy of capture.—Great Britain has until recently particularly opposed the principle of the exemption of private property on the sea from capture. There now seems to be a tendency on the part of the British to recognize that in modern warfare the capture of private property may be open to question, the opinion of some of the best of the English authorities being that there is little reason for the continuance of the practice.

There is a growing opinion that the reasons for the capture of the enemy's private property at sea are economic and political rather than military. The immunity to private property should not, however, be so extended as to interfere with necessary military operations. It would not be reasonable to exempt private property to such an extent as to cause the war to be of necessity prolonged or to result in greater destruction of life. Imperative military

necessity, of which the superior officer on the field of action at the time must judge, must override rights of private property. The question of damages may be reserved for subsequent settlement.

Recent wars have shown the course of trade under influence of new conditions.

It has become customary to allow a certain number of days of grace during which the vessels of one belligerent may enter and depart from the ports of the other belligerent. Vessels thus sailing are exempt from capture.

The ease of rapid communication by telegraph and otherwise renders the knowledge of the probable outbreak of war general. Few vessels will be taken by surprise or will start on voyages for ports which will render them liable to capture.

The practical abandonment of privateering makes capture of private property less an object of war.

The abolition of prize money by some States removes one of the stimuli to the capture of private property.

The development of continental carrying trade has made it possible for most States to supply a large portion of their needs by overland carriage. In the early days of capture of property on the sea overland commerce had not received the great impetus due to the development of steam and electricity.

The declaration of Paris of 1856, to the effect that "the neutral flag covers enemy's goods, with the exception of contraband of war," has made possible the transfer of a large portion of the enemy sea commerce to neutral flag in time of war. The absence of risk under neutral flag will also make possible cheaper rates under neutral flags. Under ordinary economic laws commerce would thus go to neutrals in time of war.

In recent wars evidence seems to show that the capture of private property has had little influence on the issue of the war and has stirred up enmity against the captor. In the Franco-Prussian war of 1870 it is reported that not more than eighty German vessels were captured. In the Spanish-American war, in 1898, comparatively little influ-

ence was exerted upon the war by the few captures of private vessels and property, and it would seem that the influence of such capture had been even less in the Russo-Japanese war of 1904–5.

Modern policy seems to show that the capture of private property at sea does not necessarily bring any great military advantage. It may happen that the military strength may be greatly lessened if naval vessels are sent in pursuit of vessels bearing private property. The cost of pursuit, capture, bringing to port, trial, and condemnation may, and often does, exceed the value of the goods and vessel captured.

The British report of the Royal Commission on Supply of Food and Raw Materials in Time of War in 1905 expresses the opinion that "the first and principal object of both sides, in case of future maritime war, will be to obtain the command of the sea," and maintains that concentration of the fleet is necessary to accomplish this purpose.

The equitable practice of days of grace will probably be continued. The use of improved means of communication will be extended. Privateering is abandoned. Prize money is beginning to be abolished. Land commerce is more and more developed. In time of war commerce is easily transferred to neutral flags. The actual influence of the capture of private property does not seem to be great. The weakening of a naval force in order to pursue and capture private property is of doubtful expediency. Such considerations as these show why the tendency to guarantee the exemption of all private property at sea in time of war by an international agreement has been looked upon with increasing favor.

The proposed exemption if it extended to all goods and property would probably make necessary an extension of the list of contraband. Contraband as now used applies only to certain classes of goods carried by or belonging to neutrals. If enemy property is placed on the same basis as neutral property, the doctrine of contraband must be interpreted accordingly and the principles enunciated with this in view.

Treatment of special vessels.—The vessels of the enemy used in commerce may be enemy private property. Certain of these vessels may readily become of great service to the enemy. Vessels of like character if belonging to a neutral could not be classed as contraband. Owing to the ease with which many types of commercial vessels may be converted to warlike uses it seems proper that such agencies of transportation should not be placed under the general exemption. The degree of exemption to be extended to vessels may properly be left to the belligerents to determine.

Considering the general conditions of modern naval warfare and commercial relations, as well as the trend of opinion, together with the exceptional character of private vessels belonging to enemy citizens, an attempt to formulate a proper regulation in regard to the exemption of private property at sea may be considered expedient. Of course such exemption does not cover property of contraband nature, property involved in violation of blockade, property involved in unneutral service, or otherwise concerned directly in the war. The regulation of exemption should apply therefore only to innocent property and ships.

Some such regulation in regard to vessels as the following seems to meet the requirements imposed by the above discussion and conclusions:

Innocent private ships, except belligerent vessels propelled by machinery and capable of keeping the high seas, are not liable to capture.

It may be said that the word "innocent" applies only to such private property or ships as have no direct relation to or share in the hostilities. It may be assumed that innocent belligerent goods or ships may be taken in case of military necessity, and when so taken full remuneration shall be paid, after the analogy of similar action on land.

Regulation.—Innocent neutral goods and ships are not liable to capture.

Innocent enemy goods and ships, except vessels propelled by machinery and capable of keeping the high seas, are not liable to capture.

Topic II.

(*a*) What should be regarded as absolutely contraband?
(*b*) What should be regarded as conditional contraband?
(*c*) What are "the circumstances under which food stuffs and coal, and raw material, such as cotton, can be declared to be contraband?" (Question of Lord Reay in House of Lords, April 13, 1905, The London Times, April 14, 1905.)

CONCLUSION.

1. *Absolute contraband.*—When within or destined for the territory within the enemy's jurisdiction or for his military or naval use the following articles are absolutely contraband:
(*a*) Military materials, such as weapons, ammunition, etc.
(*b*) Instruments solely for use in warlike purposes, as machinery for the manufacture of military materials.
(*c*) Any other articles solely for use in war.
2. *Conditional contraband.*—When destined for the enemy's military or naval use the following articles are contraband:
Means of subsistence, fuel, means and material for transportation and communication on land or sea, money, and other articles, such as cement, cotton, lumber, etc., of use either for warlike or for peaceful purposes.

DISCUSSION AND NOTES.

The nature of contraband—Early opinions.—The above three questions are so closely related that they may most advantageously be considered together under a general discussion of contraband.

While the term contraband does not occur in early codes like "Il Consolato de Mare," yet the idea was understood. Grotius does not use the word contraband, though before his time it seems to have been used somewhat in domestic law. There is mention of contraband in a treaty between

England and Holland in 1625, the year of the publication of Grotius's great work. From this time contraband became more and more a subject of definition in public international law. Grotius, however, gives a clear classification of articles of commerce, even though not using the term contraband. He enumerates:

1. Those things which have their sole use in war, such as arms.
2. Those things which have no use in war, as articles of luxury.
3. Those things which have use both in war and out of war, as money, provisions, ships, and those things pertaining to ships. (De Jure Belli et Pacis, III, I, 5.)

Grotius further says, in regard to the conditions under which articles of the third class may come:

In the third class, objects of ambiguous use, the state of the war is to be considered. For if I can not defend myself except by intercepting what is sent, necessity, as elsewhere explained, gives us a right to intercept it, but under the obligation of restitution, except there be cause to the contrary. If the supplies sent impede the exaction of my rights, and if he who sends them may know this—as if I were besieging a town or blockading a port, and if surrender or peace were expected, he will be bound to me for damages; as a person would who liberates my debtor from prison, or assists his flight to my injury; and to the extent of the damage his property may be taken, and ownership thereof be assumed for the sake of recovering my debt. If he have not yet caused damage, but have tried to cause it, I shall have a right by the retention of his property to compel him to give security for the future by hostages, pledges, or in some other way. But if, besides, the injustice of my enemy to me be very evident, and he confirms him in a most unjust war, he will then be bound to me not only civily, for the damage, but also criminally, as being one who protects a manifest criminal from the judge who is about to inflict punishment, and on that ground it will be lawful to take such measures against him as are suitable to the offense, according to the principles laid down in speaking of punishment; and therefore to that extent he may be subjected to spoliation. (Whewell's translation, Grotius, De Jure Belli et Pacis, III, I, 5.)

Destination was early recognized as an important factor in determining the character of goods in time of war. This was recognized in treaties and in proclamations. This principle seems to have been recognized in some form certainly so early as the time of Josephus. The provision is inserted in a treaty between France and England in 1303. An English proclamation of 1625 enumerates as prohibited articles of commerce with the enemy "any

manner of graine, or victualls, or any manner of provisions to serve to build, furnish, or arme any shipps of warr, or any kind of munition for warr, or materials for the same, being not of the nature of mere merchandize." (December 30, 1625.) Gradually the enumeration becomes more detailed. On March 4, 1626, a proclamation speaking of things prohibited says "His Majestie" regards the following as such, "ordinance, armes of all sortes, powder, shott, match, brimstone, copper, iron, cordage of all kinds, hempe, faile, canvas, danuce pouldavis, cables, anchors, mastes, rafters, boate ores, balcks, capraves, deale board, clap board, pipe staves, and vessels and vessel staffe, pitch, tarr, rosen, okam, corne, graine, and victualls of all sorts, all provisions of shipping, and all munition of warr, or of provisions for the same, according to former declarations and acts of state, made in this behalf in the tyme of Queen Elizabeth, of famous memorie."

This same proclamation extends the penalty for carrying contraband to the return "in the same voyage." This practice did not, however, continue in favor, and by the end of the eighteenth century the penalty for carrying contraband was generally considered to be deposited with the cargo.

Opinions of United States Courts.—In the case of *The Commercen*, in 1816, the decision rendered by Story, it is stated that--

> By the modern law of nations provisions are not, in general, deemed contraband; but they may become so, although the property of a neutral, on account of the particular situation of the war or on account of their destination. If destined for the ordinary use of life in the enemy's country they are not, in general, contraband; but it is if destined for military use. Hence, if destined for the army or navy of the enemy, or for his ports of naval or military equipment, they are deemed contraband. (1 Wheaton, U. S. Supreme Court Reports, 387.)

The decision rendered by Chief Justice Chase in the case of *The Peterhoff*, in 1866, has been regarded as stating the general principles in regard to contraband from the point of view of the United States:

> The classification of goods as contraband or not contraband has much perplexed text writers and jurists. A strictly accurate and satisfactory classification is perhaps impracticable; but that which is best

supported by American and English decisions may be said to divide all merchandise into three classes. Of these classes, the first consists of articles manufactured and primarily and ordinarily used for military purposes in time of war; the second, of articles which may be and are used for purposes of war or peace, according to circumstances; and the third, of articles exclusively used for peaceful purposes. Merchandise of the first class, destined to a belligerent country or places occupied by the army or navy of a belligerent, is always contraband; merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent; while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade or siege. (5 Wallace, U. S. Supreme Court Reports, 49.)

Mr. Balfour's opinion in 1904.—Even at present a satisfactory classification of contraband does not seem to be established. Mr. Balfour, in a reply to the Shipping Deputation on August 25, 1904, said:

I could not give a list of things which are or are not contraband of war, nor could any international lawyer fulfill any such demand. But the principle we have laid down as, we believe, in absolute conformity with the laws and practice of nations is that warlike stores carried to a belligerent are undoubtedly contraband of war; that coal carried to a belligerent for the purpose of aiding him in his warlike operations is undoubtedly contraband; that food stuffs carried to an army in the field or to a beleaguered fortress, or carried to a foreign country to aid the troops or fleet are contraband; but we do not accept the doctrine which is apparently laid down—and I lay stress on the word "apparently"—because there is some ambiguity about it. We do not accept the doctrine apparently laid down in the Russian notification that coal, food stuffs, cotton, and many other things are absolutely contraband of war, and that the mere fact that they are found on board ship justifies the seizure of the goods and, in certain circumstances, the capture and retention and confiscation of the vessel. (The Times, August 26, 1905.)

Treaty specifications in regard to contraband.—The United States has certain specific treaty agreements in regard to contraband. The treaty with Bolivia, 1858, article 17, provides that under the name contraband shall be comprehended:

1st. Cannons, mortars, howitzers, swivels, blunderbusses, muskets, fuses, rifles, carbines, pistols, pikes, swords, sabers, lances, spears, halberds and grenades, bombs, powder, matches, balls, and all other things belonging to the use of these arms.

2d. Bucklers, helmets, breastplates, coats of mail, infantry belts, and clothes made up in the form and for a military use.

3d. Cavalry belts, and horses with their furniture.

4th. And, generally, all kinds of arms offensive and defensive, and instruments of iron, steel, brass, and copper, or any other materials, manufactured, prepared, and formed expressly to make war by sea or land. (Compilation of Treaties in Force 1789–1904, p. 93.)

The treaties with Brazil in 1828, with Haiti in 1864, and with Italy in 1871 are practically identical. So also is that with Colombia of 1846, except that it has an additional category, "5th. Provisions that are imported into a besieged or blockaded place." Some of the earlier treaties show the development of lists. The treaty with Sweden in 1783 enumerates the following:

ART. 9. Under the name of contraband or prohibited goods shall be comprehended arms, great guns, cannon balls, arquebuses, musquets, mortars, bombs, petards, granadoes, saucisses, pitch balls, carriages for ordnance, musquet rests, bandoleers, cannon powder, matches, saltpetre, sulphur, bullets, pikes, sabres, swords, morions, helmets, cuirasses, halberds, javelins, pistols and their holsters, belts, bayonets, horses with their harness, and all other like kinds of arms and instruments of war for the use of troops. (Compilation of Treaties in Force 1789–1904, p. 746.)

The treaty with Prussia in 1799 provides that—

All cannons, mortars, fire-arms, pistols, bombs, grenades, bullets, balls, muskets, flints, matches, powder, saltpeter, sulphur, cuirasses, pikes, swords, belts, cartouch boxes, saddles, and bridles, beyond the quantity, necessary for the use of the ship, or beyond that which every man serving on board the vessel or passenger ought to have, and in general whatever is comprised under the denomination of arms and military stores, of what description so ever, shall be deemed objects of contraband. (Compilation of Treaties in Force 1789–1904, p. 639.)

Declarations in regard to contraband.—The following declarations have been made in recent years in regard to contraband:

UNITED STATES.—The term contraband of war comprehends only articles having a belligerent destination, as to an enemy's port or fleet. With this explanation, the following articles are, for the present, to be treated as contraband:

Absolutely contraband.—Ordnance; machine guns and their appliances, and the parts thereof; armor plate, and whatever pertains to the offensive and defensive armament of naval vessels; arms and instruments of iron, steel, brass, or copper, or of any other material, such arms and instruments being specially adapted for use in war by land or

sea; torpedoes and their appurtenances; cases for mines, of whatever material; engineering and transport materials, such as gun carriages, caissons, cartridge boxes, campaigning forges, canteens, pontoons; ordnance stores; portable range finders; signal flags destined for naval use; ammunition and explosives of all kinds; machinery for the manufacture of arms and munitions of war; saltpeter; military accouterments and equipments of all sorts; horses.

Conditionally contraband.—Coal, when destined for a naval station, a port of call, or a ship or ships of the enemy; materials for the construction of railways or telegraphs, and money, when such materials or money are destined for the enemy's forces; provisions, when destined for an enemy's ship or ships, or for a place that is besieged. (General Order, No. 492, Navy Department, June 20, 1898.)

SPAIN.—Under the denomination contraband of war, the following articles are included:

Cannons, machine guns, mortars, guns, all kinds of arms and firearms, bullets, bombs, grenades, fuses, cartridges, matches, powder, sulphur, saltpeter, dynamite, and every kind of explosive, articles of equipment like uniforms, straps, saddles, and artillery and cavalry harness, engines for ships and their accessories, shafts, screws, boilers and other articles used in the construction, repair, and arming of war ships, and in general all warlike instruments, utensils, tools, and other articles, and whatever may hereafter be determined to be contraband. (Article VI, Spanish Decree of April 23, 1898.)

The continental position has usually been to maintain two classes of goods only, i. e., contraband and non-contraband.

The Japanese proclamation of February 10, 1904, follows the British and American practice of making a distinction between absolute and conditional contraband:

ART. XIII. The following goods are contraband of war when they are destined to the enemy's territory or to the enemy's army or navy:

Arms, ammunition, explosives, and materials (including also lead, saltpeter, sulphur, etc.), and machines for manufacturing them; cement; uniforms and equipment for army and navy; armor plates; materials for building ships and their equipments; and all articles to be used solely for hostile purposes.

ART. XIV. The following goods are contraband of war in case they are destined to the enemy's army or navy, or in case they are destined to the enemy's territory and from the landing place it can be inferred that they are intended for military purposes:

Provisions and drinks; *clothing and materials for clothing;*[a] horses; harnesses; fodder; wheeled vehicles; coal and *other kinds of fuel;*[a]

[a] The words in italics were added to the regulations by an amendment of February 9, 1905.

timber; currency; gold and silver bullion; materials for telegraph, telephone, and railroad.

ART. XV. The destination of a vessel is generally considered as also the destination of her cargo.

The Russian rules in regard to maritime prizes were approved by the Emperor on March 27, 1895. These rules are full, containing 93 articles. The general provisions are as follows:

DISPOSITIONS GÉNÉRALES.

ARTICLE 1. Les dispositions du présent règlement sont applicables à tous les cas de prises, sauf ceux qui sont régis par des règles spéciales résultant de traités passés avec la Russie.

Remarque.—Des règles spéciales sont applicable à la saisie des objets appartenant à l'ennemi lorsqu'ils se trouvent sur la côte.

ART. 2. En vertu de la déclaration de Paris du 4/16 avril 1856, les règles suivantes sont observées dans l'application du présent règlement: 1° des lettres de marque ne sont pas délivrées au nom des particuliers; 2° le pavillon neutre couvre le chargement ennemi, sauf la contrebande de guerre; 3° les marchandises neutres, sauf la contrebande de guerre, ne peuvent être confisquées sous pavillon ennemi; 4° le blocus, pour être considéré comme obligatoire, doit être effectif, c'est-à-dire appuyé de forces militaires suffisantes pour empêcher l'accès de la côte ennemie.

ART. 3. Pour la validité de la prise, il faut qu'elle ait eu lieu par la force ouverte ou par une ruse de guerre licite, mais jamais par trahison.

ART. 4. Le gouvernement impérial, tout en admettant l'application du principe de réciprocité aux dispositions du présent règlement limitatives du droit d'arrêter, de visiter, de saisir et de confisquer les bâtiments appartenant à un État ennemi ou neutre ou á ses resortissants, se réserve le droit d'y déroger à l'égard de ceux de ces États de la part desquels on ne peut en espérer l'observation, et il réglera sa manière d'agir en cette matière suivant les circonstances de chaque cas particulier.

ART. 5. Sont considérés comme prises: 1° les navires et chargements appartenant à l'ennemi, ainsi que les navires et chargements appartenant aux neutres et 2° les navires et chargements russes, alliés ou neutres repris à l'ennemi, au cas où la capture ou reprise a eu lieu conformément aux dispositions du présent règlement.

In regard to neutral ships it is provided:

ART. 11. Les navires de commerce de nationalité neutre sont susceptibles de confiscation à titre de prise dans les cas suivants: 1° quand ils sont surpris transportant à l'ennemi ou au port ennemi: (*a*) Des armes à feu et des munitions ainsi que des explosifs en n'importe quelle quantité, (*b*) d'autres objets de contrebande de guerre en

quantité dépassant la moitié du volume ou du poids du chargement, (*c*) des détachements de troupes ennemies, si, dans tous les cas, il n'est pas prouvé que la déclaration de guerre était restée ignorée du capitaine; 2° quand ils sont surpris violant le blocus et qu'il n'est pas prouvé que l'établissement du blocus était resté ignoré du capitaine, 3° quand ils résistent à main armée à l'ordre d'arrêt, à la visite ou à la capture; 4° quand ils ont participé aux actes d'hostilité de l'ennemi.

ART. 12. Le chargement des navires de commerce de nationalité neutre est susceptible de confiscation à titre de prise: 1° quand ce chargement consiste en contrebande de guerre portée à l'ennemi ou dans un port ennemi et qu'il n'est pas prouvé que la déclaration de guerre est restée ignorée du capitaine; 2° quand le chargement se trouve à bord d'un navire susceptible de confiscation en vertu des paragraphes 2–4 de l'article 11 et qu'il n'est pas prouvé qu'il appartient à des sujets ou à des neutres étrangers aux actes entraînant la confiscation.

ART. 13. La liste des objets réputés contrebande de guerre est portée à la connaissance du public par une déclaration spéciale. Sont exempts de confiscations ceux de ces objets qui font partie de l'armement et de l'approvisionnement du navire de nationalité neutre.

In accord with the above article 13, Russia issued the following rules early in the war with Japan in 1904:

6. The following articles are deemed to be contraband of war:

(1) Small arms of every kind, and guns, mounted or in sections, as well as armor plates;

(2) Ammunition for firearms, such as projectiles, shell fuses, bullets, priming, cartridges, cartridge cases, powder, saltpeter, sulphur;

(3) Explosives and materials for causing explosions, such as torpedoes, dynamite, pyroxyline, various explosive substances, wire conductors, and everything used to explode mines and torpedoes;

(4) Artillery, engineering, and camp equipment, such as gun carriages, ammunition wagons, boxes or packages of cartridges, field kitchens and forges, instrument wagons, pontoons, bridge trestles, barbed wire, harness, etc.;

(5) Articles of military equipment and clothing, such as bandoliers, cartridge boxes, knapsacks, straps, cuirasses, intrenching tools, drums, pots and pans, saddles, harness, completed parts of military uniforms, tents, etc.;

(6) Vessels bound for an enemy's port, even if under a neutral commercial flag, if it is apparent from their construction, interior fittings, and other indications that they have been built for warlike purposes, and are proceeding to an enemy's port in order to be sold or handed over to the enemy;

(7) Boilers and every kind of naval machinery, mounted or unmounted;

(8) Every kind of fuel, such as coal, naphtha, alcohol, and other similar materials;

(9) Articles and materials for the installation of telegraphs, telephones, or for the construction of railroads;

(10) Generally, everything intended for warfare by sea or land, as well as rice, provisions, and horses, beasts of burden, and other animals, which may be used for a warlike purpose, if they are transported on the account of, or are destined for, the enemy.

7. The following acts, forbidden to neutrals, are assimilated to contraband of war: The transport of the enemy's troops, of his dispatches and correspondence, the supply of transports and war ships to the enemy. Neutral vessels captured in the act of carrying contraband of this nature may, according to circumstances, be seized and even confiscated. (Rules of February 14, 1904.)

This Russian declaration in regard to contraband has called forth definite statements in regard to the position which certain neutral Governments proposed to assume. Various protests against the extreme position of Russia were lodged with that Government.

Prize court decisions.—Decisions have been made in accord with the Russian enumeration. These decisions of the Russian prize courts in some instances have been called in question. In some quarters this questioning of the decision of a prize court has been regarded as contrary to international comity if not to law. Such statements have been quoted as that of Walker's in regard to the regular prize court:

That prize court can, by the nature of the case, be only the prize court of the captor, since, on the one hand, no independent belligerent will submit the legality of his conduct to the determination of third powers, and, on the other hand, no neutral third power can consistently with neutrality interfere between captor and captured. It has accordingly become well-recognized law that, in general, the jurisdiction of the prize court of the captor is in prize questions exclusive and the judgment of that court on a point within its competence is conclusive against the world. (Manual of Public International Law, p. 151.)

Prize courts, however, are not supposed to be prejudiced, though undoubtedly the local conditions may sometimes influence judgments.

Sir William Scott, in the case of the *Maria*, in 1799, declared the purpose of the prize court to be—

to administer with indifference that justice which the law of nations holds out, without distinction to independent States, some happening to be neutral and some to be belligerent. The seat of judicial author-

ity is, indeed, locally here, in the belligerent country, according to the known law and practice of nations; but the law itself has no locality. (1 C. Robinson's Admiralty Reports, 340.)

In supporting the position that a neutral nation is not bound to abide by the decision of a prize court, if such court is not properly constituted and does not respect international law, Mr. Balfour, in the House of Commons on August 11, 1904, said:

I must traverse the doctrine that when any prize court has given a decision, if the decision is contrary to the law of nations, it is to be accepted by the neutral. No neutral, doubtless, would desire to quarrel with the decision of a perfectly constituted prize court of a belligerent country dealing with these matters; but if it be found that those prize courts do habitually condemn as contraband of war things which the law of nations says are not unconditional contraband of war, I do not think it would be possible for the neutral to sit down absolutely quiescent under a decision of that character.

Great Britain also acted in accord with this principle in asserting that she could not recognize as binding the decision of a prize court which should attempt to maintain the declaration of France in 1885 that rice bound for north China ports would be regarded as contraband. (Parliamentary Papers, France, No. 1, 1885.)

It must be observed that this position does not completely accord with the position taken in Holland's British Admiralty Manual of Prize Law, which asserts that—

It is a part of the prerogative of the Crown during the war to extend or reduce the lists of articles to be held absolutely or conditionally contraband, subject, however, to any treaty engagements binding upon Great Britain. (No. 65.)

Nor does this clause of the Admiralty Manual accord with the position taken by other States during the Russo-Japanese war in 1904. The States protesting against the classification of contraband made by Russia asserted that such classification could not be arbitrarily extended, but should be in accord with international law.

At the meeting of the Institute of International Law at Edinburgh, in September, 1904, the Lord Chancellor set forth the position which has met with growing favor. He said;

Because two nations go to war they have no right to interrupt and interfere with the commerce of the world. They must recognize that people who are not engaged in the quarrel have a right to carry on their commerce.

Protests against Russian attitude, 1904–5.—Protests and representations of various degrees of directness were made in consequence of Russia's attitude on contraband in the Russo-Japanese war of 1904–5.

The Government of the United States sent the following communication:

DEPARTMENT OF STATE,
Washington D. C., June 10, 1904.

To the Ambassadors of the United States in Europe:

GENTLEMEN: It appears from public documents that coal, naphtha, alcohol, and other fuel have been declared contraband of war by the Russian Government. These articles enter into general consumption in the arts of peace, to which they are vitally necessary. They are usually treated, not as "absolutely contraband of war," like articles that are intended primarily for military purposes in time of war, such as ordnance, arms, ammunition, etc., but rather as "conditional contraband," that is to say, articles that may be used for or converted to the purposes of war or peace, according to circumstances. They may rather be classed with provisions and food stuffs of ordinarily innocent use, but which may become absolutely contraband of war when actually and especially destined for the military or naval forces of the enemy.

In the war between the United States and Spain the Navy Department General Orders, No. 492, issued June 20, 1898, declared in article 19, as follows:

"The term contraband of war comprehends only articles having a belligerent destination." Among articles absolutely contraband it declared ordnance, machine guns, and other articles of military or naval warfare. It declared as conditional contraband "coal, when destined for a naval station, a port of call, or a ship or ships of the enemy." It likewise declared provisions to be conditionally contraband "when destined for the enemy's ship or ships, or for a place that is besieged."

The above rules as to articles absolutely or conditionally contraband of war were adopted in the naval war code promulgated by the Navy Department June 27, 1900. (Withdrawn February 4, 1904.)

While it appears that the documents mentioned that rice, food stuffs, horses, beasts of burden, and other animals which may be used in time of war are declared to be contraband of war only when they are transported for account of or destined to the enemy, yet all kinds of fuel, such as coal, naphtha, alcohol are classified along with arms, ammunition, and other articles intended for warfare on land and sea.

The test in determining whether articles *ancipitis usus* are contraband of war is their destination for military uses of a belligerent. Mr. Dana in his notes to Wheaton's International Law, says:

"The chief circumstance of inquiry would naturally be the port of destination. If that is a naval arsenal, or a port in which vessels of war are usually fitted out, or in which a fleet is lying, or a garrison town, or a place from which military expedition is fitted out, the presumption of military use would be raised more or less strongly according to circumstances."

In the wars of 1859 and 1870 coal was declared by France not to be contraband. During the latter war Great Britain held that the character of coal depended upon its destination and refused to permit vessels to sail with it to the French fleet in the North Sea. Where coal or other fuel is shipped to a port of a belligerent, with no presumption against its specific use, to condemn it as absolutely contraband would seem to be an extreme measure.

Mr. Hall, International Law, says:

"During the West African conference in 1884 Russia took occasion to dissent vigorously from the inclusion of coal among articles contraband of war, and declared that she would categorically refuse her consent to any articles in any treaty, convention, or instrument whatever which would imply its recognition as such."

We are also informed that it is intended to treat raw cotton as a contraband of war. While it is true raw cotton could be made into clothing for military uses of a belligerent, a military use for the supply of the army or garrison might possibly be made of foodstuff of every description which might be shipped from neutral ports to the nonblockaded ports of a belligerent. The principle under consideration might, therefore, be extended so as to apply to every article of human use which might be declared contraband of war simply because it might ultimately become in any degree useful to a belligerent for military purposes.

Coal or other fuel and cotton are applied for a great many innocent purposes. Many nations are dependent on them for the conduct of inoffensive industries, and no sufficient presumption of an intended warlike use seems to be afforded by the mere fact of their destination to a belligerent port. The recognition in principle of the treatment of coal and other fuel and raw cotton as absolutely contraband might ultimately lead to a total inhibition of the sale by neutrals to the people of belligerent States of all articles which could be finally converted to military uses. Such an extension of the principle, by treating coal and all other fuel and raw cotton as absolute contraband of war simply because they are shipped by a neutral to a nonblockaded port of a belligerent, would not appear to be in accord with the reasonable and lawful rights of a neutral commerce.

I am your obedient servant, JOHN HAY.

Later in 1904 there was an exchange of views on the subject of the declaration of Russia between the Governments of Great Britain and the United States.

Mr. Choate to Lord Lansdowne.

AMERICAN EMBASSY,
London, June 24, 1904.

MY LORD: Referring to our recent interviews, in which you expressed a desire to know the views of my Government as to the order issued by the Russian Government on the 28th of February last, "making every kind of fuel, such as coal, naphtha, alcohol, and other similar materials, unconditionally contraband," I am now able to state them as follows:

These articles enter into great consumption in the arts of peace, to which they are vitally necessary. They are usually treated not as "absolutely contraband of war," like articles that are intended primarily for military purposes in time of war, such as ordnance, arms, ammunition, etc., but rather as "conditionally contraband;" that is to say, articles that may be used for or converted to the purposes of war or peace according to circumstances. They may rather be classed with provisions and foodstuffs of ordinarily innocent use, but which may become absolutely contraband of war when actually and especially destined for the military and naval forces of the enemy. * * * The recognition in principle of the treatment of coal and other fuel and raw cotton as absolutely contraband of war might ultimately lead to a total inhibition of the sale by neutrals to the people of belligerent states of all articles which could be finally converted to military uses. Such an extension of the principle, by treating coal and all other fuel and raw cotton as absolutely contraband of war simply because they are shipped by a neutral to a nonblockaded port of a belligerent, would not appear to be in accord with the reasonable and lawful rights of a neutral commerce.

I shall be glad to receive and transmit to my Government the views of His Majesty's Government on the same question as soon as your lordship shall have formulated them.

I have, etc., JOSEPH H. CHOATE.

Lord Lansdowne replied:

FOREIGN OFFICE, *July 29, 1904.*

YOUR EXCELLENCY: I have the honor to acknowledge the receipt of your note of the 24th ultimo, containing the views of the United States Government with regard to the Russian regulations of the 28th February last, in which every kind of fuel, such as coal, naphtha, alcohol, and other similar materials is declared to be absolutely and unconditionally contraband of war.

I have the honor to inform Your Excellency, in reply to your request to be furnished with the views of His Majesty's Government on

this subject, that the views of the United States Government, as expressed in Your Excellency's note, are generally in accord with those which have been held and acted upon from time to time by His Majesty's Government. With reference, however, to the statement made in paragraph 7 as to the attitude of Great Britain in 1870 in regard to coal, I would observe that Her late Majesty's Government refused in that year to permit vessels to sail with coal to the French fleet, not merely because they held that the character of the coal depended upon its destination, but because they held that steamers engaged to take out cargoes of coal to the French fleet in the North Sea would be in reality acting as storeships to that fleet.

It is, however, right that I should add that in the altered conditions of modern maritime warfare and the ever increasing importance of the part played therein by coal, His Majesty's Government propose to submit the whole question to careful and exhaustive examination at an early date, with the question of determining whether and in what respects the British rules, as hitherto acted upon, are in need of revision.

In these circumstances His Majesty's Government do not propose to make any formal protest at the present stage against the Russian declaration in so far as the question of coal is concerned. They have, however, already entered a protest against the treatment of foodstuffs as absolutely contraband, and they have pointed out that they observe with great concern that rice and provisions will be treated as unconditionally contraband, a step which they regard as inconsistent with the law and practice of nations.

In that protest it was stated that His Majesty's Government does not contest that in particular circumstances provisions may acquire a contraband character, as, for instance, if they should be consigned direct to the army or fleet of a belligerent, or to a port where such fleet may be lying, or if facts should exist raising the presumption that they are about to be employed in victualing the fleet or forces of the enemy. In such cases it is not denied that the other belligerent would be entitled to seize the provisions as contraband of war, on the ground that they would afford material assistance toward the carrying on of warlike operations.

They could not, however, admit that if such provisions were consigned to the port of a belligerent (even though it should be a port of naval equipment) they must, on that ground alone, be of necessity regarded as contraband of war.

In the view of His Majesty's Government the test appeared to be whether there are circumstances relating to any particular cargo to show that it is destined for military or naval use.

His Majesty's Government further pointed out that the decision of the prize court of the captor in such matters, in order to be binding on neutral states, must be in accordance with recognized rules and principles of international law and procedure.

They therefore felt themselves bound to reserve their rights by pro-

testing at once against the doctrine that it is for the belligerent to decide that certain articles or classes of articles are, as a matter of course and without reference to the considerations above referred to, to be dealt with as contraband of war regardless of the well-established rights of neutrals; nor would they consider themselves bound to recognize as valid the decision of any prize court which violated these rights, or was otherwise not in conformity with the recognized principles of international law.

I have, etc., LANSDOWNE.

The position of Great Britain was also clearly stated in a communication to the British representative in Russia:

It has been held by this country, and our officers have been so instructed, that the term "contraband of war" includes only articles having belligerent destination and purpose. Such articles have been classed under two heads—

1. Those that are primarily and ordinarily used for military purposes in time of war, e. g., arms and munitions of war, military material, etc.; articles of this kind being usually described as absolutely contraband.

2. Those that may be, and are, used for peaceful or warlike purposes according to circumstances; such articles being usually described as conditionally contraband. (Marquess of Lansdowne to Sir C. Hardinge, August 10, 1904. Parliamentary Papers, Russia, No. 1 (1905), p. 13.)

On August 30, 1904, the United States Government made known to its ambassador at St. Petersburg its position on certain questions relating to contraband. The letter is as follows:

No. 143.] DEPARTMENT OF STATE,
Washington, August 30, 1904.

His Excellency ROBERT S. MCCORMICK, Etc.,
St. Petersburg.

SIR: I have the honor to acknowledge the receipt of your No. 176, of the 10th instant.

The Department has carefully considered the note of the Russian minister of foreign affairs, dated July 27 last, a copy of which is inclosed with your dispatch, with reference to the decision of the prize court in the case of the steamship *Arabia*, containing American cargo, seized by the Russian naval forces and sent to Vladivostok for adjudication.

As communicated to you by the minister the decision of the court was "that the steamer *Arabia* was lawfully seized, that the cargo, composed of railway material and flour, weighing about 2,360,000 livres, destined to Japanese ports and addressed to different commercial houses in said ports, constitutes contraband of war; * * *

that the cargo bound for Japanese ports should be confiscated as being lawful prize."

In communicating the said decision the minister observed, in response to the request of this Government for the release of the non-contraband portion of the cargo, that the question could only be decided through judicial channels on the basis of a decision of the prize court.

This is the first authentic information which the Department has received of the precise grounds on which the prize court decided to confiscate the railway material and flour in question. The judgment of confiscation appears to be founded on the mere fact that the goods in question were bound for Japanese ports and addressed to various commercial houses in said ports. In view of its well-known attitude it should hardly seem necessary to say that the Government of the United States is unable to admit the validity of the judgment, which appears to have been rendered in disregard of the settled law of nations in respect to what constitutes contraband of war. If the judgment and the communication accompanying its transmission are to be taken as an expression of the attitude of His Imperial Majesty's Government, and as an interpretation of the Russian imperial order of February 29 last, it raises a question of momentous import in its bearing on the rights of neutral commerce.

The Russian imperial order denounces as absolutely contraband of war telegraph, telephone, and railway materials, and fuel of all kinds, without regard to the question whether destined for military or for purely pacific and industrial uses.

Clause 5, article 10, of the imperial order denounces as contraband of war "all articles destined for war on land or sea, as well as rice, provisions, and horses, beasts of burden, and others (autres) capable of serving a warlike purpose, and if they are transported on account of or to the destination of the enemy."

The ambiguity of meaning which characterizes the language of this clause, lending itself to a double interpretation, left its real intendment doubtful. The vagueness of the language, used in so important a matter, where a just regard for the rights of neutral commerce required that it should be clear and explicit, could not fail to excite inquiry among American shippers who, left in doubt as to the significance attributed by His Imperial Majesty's Government to the word "enemy"—uncertain as to whether it meant "enemy government or forces" or "enemy ports or territory"—have been compelled to refuse the shipment of goods of any character to Japanese ports. The very obscurity of the terms used seemed to contain a destructive menace, even to legitimate American commerce.

In the interpretation of clause 10 of article 5, and having regard to the traditional attitude of His Imperial Majesty's Government, as well as to the established rule of international law, with respect to goods which a belligerent may or may not treat as contraband of war, it seemed to the Government of the United States incredible that the

word "autres" or the word "l'ennemi" could be intended to include, as contraband of war, food stuffs, fuel, cotton, and all "other" articles destined to Japanese ports, irrespective of the question whether they were intended for the support of a noncombatant population or for the use of the military or naval forces. In its circular of June 10 last, communicated by you to the Russian Government, the Department interpreted the word "enemy" in a mitigated sense, as well as in accordance with the enlightened and humane principles of international law, and therefore it treated the word "enemy," as used in the context, as meaning "enemy Government or forces" and not the "enemy ports or territory."

But if a benign interpretation was placed on the language used, it is because such an interpretation was due to the Russian Government, between whom and the United States a most valued and unbroken friendship has always existed, and it was no less due to the commerce of the latter, inasmuch as the broad interpretation of the language used would imply a total inhibition of legitimate commerce between Japan and the United States, which it would be impossible for the latter to acquiesce in.

Whatever doubt could exist as to the meaning of the imperial order has been apparently removed by the inclosure in your dispatch of the note from Count Lamsdorff, stating tersely and simply the sentence of the prize court. The communication of the decision was made in unqualified terms, and the Department is therefore constrained to take notice of the principle on which the condemnation is based and which it is impossible for the United States to accept, as indicating either a principle of law or a policy which a belligerent State may lawfully enforce or pursue toward the United States as a neutral.

With respect to articles and material for telegraphic and telephonic installations, unnecessary hardship is imposed by treating them all as contraband of war, even those articles which are evidently and unquestionably intended for merely domestic or industrial uses. With respect to railway materials, the judgment of the court appears to proceed in plain violation of the terms of the imperial order, according to which they are to be deemed to be contraband of war only if intended for the construction of railways. The United States Government regrets that it could not concede that telegraphic, telephonic, and railway materials are confiscable simply because destined to the open commercial ports of a belligerent.

When war exists between powerful States it is vital to the legitimate maritime commerce of neutral States that there be no relaxation of the rule—no deviation from the criterion—for determining what constitutes contraband of war lawfully subject to belligerent capture, namely, warlike nature, use, and destination. Articles which, like arms and ammunition, are by their nature of self-evident warlike use are contraband of war if destined to enemy territory; but articles which, like coal, cotton, and provisions, though of ordinarily innocent,

are capable of warlike use, are not subject to capture and confiscation unless shown by evidence to be actually destined for the military or naval forces of a belligerent.

This substantive principle of the law of nations can not be overridden by a technical rule of the prize court that the owners of the captured cargo must prove that no part of it may eventually come to the hands of the enemy forces. The proof is of an impossible nature, and it can not be admitted that the absence of proof, in its nature impossible to make, can justify the seizure and condemnation. If it were otherwise all neutral commerce with the people of a belligerent State would be impossible; the innocent would suffer inevitable condemnation with the guilty.

The established principle of discrimination between contraband and noncontraband goods admits of no relaxation or refinement. It must be either inflexibly adhered to or abandoned by all nations. There is and can be no middle ground. The criterion of warlike usefulness and destination has been adopted by the common consent of civilized nations after centuries of struggle in which each belligerent made indiscriminate warfare upon all commerce of all neutral States with the people of the other belligerent, and which led to reprisals as the mildest available remedy.

If the principle which appears to have been declared by the Vladivostok prize court and which has not so far been disavowed or explained by His Imperial Majesty's Government is acquiesced in, it means, if carried unto full execution, the complete destruction of all neutral commerce with the noncombatant population of Japan; it obviates the necessity of blockades; it renders meaningless the principle of the Declaration of Paris set forth in the imperial order of February 29 last that a blockade in order to be obligatory must be effective; it obliterates all distinction between commerce in contraband and noncontraband goods, and is in effect a declaration of war against commerce of every description between the people of a neutral and those of a belligerent State.

You will express to Count Lamsdorff the deep regret and grave concern with which the Government of the United States has received his unqualified communication of the decision of the prize court; you will make earnest protest against it and say that the Government of the United States regrets its complete inability to recognize the principle of that decision and still less to acquiesce in it as a policy.

I have the honor to be, sir, your obedient servant,

JOHN HAY.

The American ambassador on September 21 sent the following reply:

No. 186.] AMERICAN EMBASSY,

St. Petersburg, September 21, 1904.

SIR: I have the honor to confirm my cablegram of the 19th with reference to the attitude of the Russian Government on the subject of contraband of war and to transmit to you a copy of a memorandum

handed me by Count Lamsdorff practically reiterating what he had said to me on former occasions with reference to any discussion of the facts or of the principle involved in the seizure and condemnation by the prize court at Vladivostok of that part of the cargoes of these two ships which were consigned to merchants in open Japanese ports.

Count Lamsdorff was not prepared to take any issue with me on the declarations and principles contained in your circular note (circular of June 10, 1904, printed ante) and your instructions No. 143, of August 30 (printed ante), a copy of the former having been handed to him, and the contents of the latter having been transmitted to him practically in extenso as well as the contents of your instruction on the subject of the seizure of the cargo of the *Arabia*.

Count Lamsdorff said, in addition to what I have already transmitted to you by cable, that to unconditionally accept as noncontraband all merchandise not universally accepted or described in their own rules as such would open the door to contractors in Japan to import food stuffs and other merchandise without limit for account of the Japanese Government; that is, on account of or in destination of the enemy. That the Russian Government could not but consider as contraband a cargo of flour consigned to a port at which was quartered a large body of troops, and that, extending this principle, the ultimate destination of the cargo had to be taken into consideration, although its direct consignment might be to a merchant in an open port.

This statement, with a copy of the aide-memoire which is herewith inclosed, will enable you to understand the position of the Russian Government at this time.

My only reply was that it meant, practically, abrogation of the principle "that the blockade, in order to be obligatory, must be effective," and relieved Russia of the necessity of maintaining one. To this he replied that nobody would be so naive as to consign merchandise not prima facie contraband, although intended for the enemy, to the destination of the enemy, substituting therefor a middleman in the shape of a merchant in the open port. He added here, as he repeated several times, that we would see that in the future there would be less ground for complaint and that it was far from the desire of the Russian Government to place any obstacles in the way of legitimate commerce with Japan, but that they would be compelled to take such steps as would be necessary to prevent supplies of any character ultimately intended for the use of the enemy from reaching their destination. He added that the several notes I had written on the subject, as well as your circular note of June 10, had been handed to Professor Martens, who would consider the representations made therein when the cases of the *Arabia* and *Calchas* came before the admiralty court of St. Petersburg.

The Russian Government admitted that provisions might be regarded as conditionally contraband.

The British Government expressed its approval and commented on the matter.

Sir C. Hardinge to Count Lamsdorff.

ST. PETERSBURG, *September 28 (October 11), 1904.*

M. LE COMTE: I duly reported to His Majesty's Government that Your Excellency had informed me that the Russian Government have, in consequence of the decision of the Commission appointed by Imperial Order under the Presidency of Professor Martens, to study the question of contraband of war, issued supplementary instructions to Naval Commanders and Naval Prize courts, defining the interpretation of section 10 of Article 6 of the Regulations of the 27th February last. According to the supplementary instructions, the conditionally contraband nature of rice and provisions, used for peaceful or warlike purposes according to circumstances, is admitted by the Russian Government.

I am now instructed by the Marquess of Lansdowne to inform Your Excellency that His Majesty's Government desire to acknowledge the friendly spirit in which their representations in this matter have been met by the Russian Government. They learn with satisfaction that it is not intended to treat rice and provisions as unconditionally contraband of war, and they trust that Your Excellency's anticipation (which I mentioned to Lord Lansdowne), that the decision arrived at will tend to avoid difficulties in the future, may be realized.

His Majesty's Government note that, in the view of the Russian Government, such articles are not necessarily free from seizure and condemnation as contraband of war merely because they are addressed to private firms or individuals in the enemy's country, the Russian Government holding that they may, nevertheless, be in reality intended for the military or naval forces of the enemy.

While His Majesty's Government do not contend that the mere fact that the consignee is a private person should necessarily give immunity from capture, they hold, on the other hand, that to take vessels for adjudication merely because their destination is the enemy's country would be vexatious and constitute an unwarrantable interference with neutral commerce. To render a vessel liable to such treatment there should, in the opinion of His Majesty's Government, be circumstances giving rise to a reasonable suspicion that the provisions are for the enemy's forces, and it is in such a case for the captor to show that the grounds of suspicion are adequate and to establish the fact of destination for the enemy's forces before attempting to procure their condemnation.

In bringing these views to Your Excellency's notice I am to state that, for the reasons mentioned, His Majesty's Government trust that the instructions now issued will be interpreted in a liberal and considerate spirit by the Naval Commanders and the Prize Courts to whom they are addressed.

I am to add, at the same time, that His Majesty's Government can not refrain from expressing their regret that the same principle has,

so far, not been admitted in the case of certain other commodities enumerated in the Regulations issued in February last—such, for example, as coal and raw cotton, which clearly appear to be susceptible of use for other than warlike purposes. They cherish, however, the hope that the views which His Majesty's Government have already expressed on this subject may receive favorable consideration at the hands of the Russian Government and that the principle of conditional contraband, which has been admitted by the Russian Government, may receive still further extension in its application.

I avail, etc.,

(Signed) CHARLES HARDINGE.

(Parliamentary Papers, Russia, No. 1 (1905), p. 26.)

In consequence of the questions and protests, interpretations and modifications of the rules were made.

In the *Journal de Saint Petersbourg* of September 30, 1904, the following appeared:

In consequence of doubts which have arisen as to the interpretation of article 6, section 10, of the regulations respecting contraband of war, it has been resolved, as we are in a position to announce, that the articles in regard to which no decision has been taken shall be considered as contraband of war if they are destined for:

The government of the belligerent powers;

Their administrations;

Their army; or

Their purveyors.

In cases where they are addressed to private individuals these articles shall not be considered as contraband of war.

Vessels shall only be confiscated in cases where prohibited merchandise forms more than half of the cargo.

In the contrary case only the cargo shall be confiscated. All possible measures have thus been taken to insure freedom of commerce to neutral powers.

It is to be hoped that the Powers will appreciate the considerable latitude which is at present allowed to the free movement of their commerce and will not give occasion to reproach them with abuses relative to the Regulations on Contraband of War. (Parliamentary Papers, Russia, No. 1 (1905), p. 23.)

The Russian rules relating to conditional contraband received further consideration by the British Government. The following letter indicates the position taken:

Sir C. Hardinge to Count Lamsdorff.

ST. PETERSBURG, *October 9, 1904.*

M. LE COMTE: On the 16th August I had the honour to communicate to Your Excellency the substance of a despatch which I had received from the Marquess of Lansdowne, in which the views of His Majesty's

Government were very clearly expressed on the subject of the treatment by the Russian Government as unconditional contraband of an extensive category of articles enumerated under sections 8 and 10 of Rule 6 of the Regulations published by the Russian Government on the 14th February of this year. In this statement of the views of His Majesty's Government, Lord Lansdowne explained the grounds upon which it was impossible to admit the claims of the Russian Government, and he defined the measures which His Majesty's Government would be reluctantly compelled to take in the event of the interests of British subjects suffering by the application of these rules.

It was with much satisfaction that I received on the 16th ultimo a verbal communication from Your Excellency to the effect that the principle of conditional contraband was admitted by the Russian Government, and that all the articles mentioned in paragraph 10 of article 6 of the Rules of the 14th February, 1904, with the exception of horses and beasts of burden, had been recognized as articles of a conditionally contraband nature.

I have since had the honor to point out to Your Excellency that the principle of conditional contraband having been admitted by the Russian Government, the application of this principle could not be logically withheld from coal, which, though essentially contraband when used for warlike objects, has a much wider use for peaceful purposes, and being a commodity of primary necessity for heating, cooking, and manufactures, enjoys when so employed a perfectly innocent character.

In reply to my representation, Your Excellency has been so good as to inform me that the conclusions of the Ministry for Foreign Affairs upon the question of principle raised by me have been communicated to the Ministry of Marine for their consideration, and I can only hope that a solution of this question may be arrived at in accordance with international usage, and that the instructions already issued to Naval Commanders and Prize Courts may be extended so as to include as conditionally contraband all articles of dual use when not destined for the belligerent forces of the enemy.

The new doctrine, which is in complete contradiction to the law and practice of nations sanctioned by international usage, and which is entirely contrary to the former views of the Russian Government, viz, that coal and fuel of every kind are contraband, irrespective of their destination, and that the seizure of cargoes, or the vessels containing them, upon the ground that they included such articles is justifiable in international law, is one which it is impossible for His Majesty's Government to admit. It has been suggested to me by Your Excellency that in view of the fact that Russian war ships proceeding to the Far East are not allowed to purchase coal in British ports it could hardly be claimed that British merchant vessels should have the right to carry coal to the ports of the enemy, even if it is not destined for warlike purposes. The reply to this suggestion is obvious. An article of commerce may be so essential for hostile purposes that

no war ship should be supplied with it in neutral waters, and yet so essential for the ordinary purposes of civil life that it should not be prevented from reaching the peaceful inhabitants of belligerent countries. The dual character of coal, as contraband of war, forms a very apt illustration of the above.

There is another aspect of this question to which I would invite Your Excellency's attention. From the enormous quantities of coal which arrive daily in Russia from Great Britain, for both peaceful and warlike purposes, it is evident that the British trade in coal is of very great importance. It is equally certain that the importance of this trade is not confined to exports to Russia, and that very large exports of coal to Japan, for purposes both of peace and war. take place. Your Excellency will, I am confident, admit that the fact of the Governments of Russia and Japan being at war is not in itself a sufficient reason why the peaceful commerce between Great Britain and commercial houses in Japan should be treated with such severity as to render commerce both dangerous and even prohibitive.

So, also, as regards raw cotton, which, by Imperial Order on the 21st April, was declared to be absolute contraband of war. Your excellency may not be aware that British India is by far the largest importer of raw cotton into Japan, the quantities imported in 1901 and 1902 being more than double those imported from the United States of America or from any other country, while the value of raw cotton sent to Japan from India in each of the above-mentioned years amounted to nearly 40,000,000 rubles and one-half of the total value of all the cotton imported into Japan. The quantity of raw cotton that might be utilized for explosives would be infinitesimal in comparison with the bulk of the cotton exported from India to Japan for peaceful purposes, and to treat harmless cargoes of this latter description as unconditionally contraband would be to subject a branch of innocent commerce which is specially important in the Far East to a most unwarrantable interference.

As I have already had the honor of explaining to Your Excellency, His Majesty's Government have no desire to place obstacles in the way of a belligerent desiring to take reasonable precautions in order to prevent his enemy from receiving supplies, but they can not admit that the right of adopting such precautions implies a consequential right to abolish by a stroke of the pen the long-established distinction between articles which are conditionally and those which are absolutely contraband of war, and to intercept at a distance from the scene of operations and without proof of their ultimate destination a numerous category of articles in themselves of an innocent description and largely dealt in by neutral Powers, but which that belligerent may have announced his intention of regarding as unconditional contraband of war.

The principle of conditional contraband has already been recognized by the Russian Government, and it only remains to extend its application to coal, cotton, and other articles which may be used for peace-

ful or warlike purposes according to circumstances. Such a measure would be consistent with the law and practice of nations and with the well-established rights of neutrals. While maintaining the rights of a belligerent, the rights of neutrals would be respected, and the source of a serious and unprofitable controversy would be removed.

In making these representations to Your Excellency in accordance with the instructions which I have received from the Marquess of Lansdowne, I am convinced that you will give this matter the very serious consideration which is its due, and I trust that Your Excellency will be in a position to inform me shortly that a solution has been arrived at which may prove satisfactory to both Governments.

I avail, etc.,

CHARLES HARDINGE.

(Parliamentary Papers, Russia, No. 1 (1905), p. 24.)

In reply to the British ambassador's request the following interpretation was given by Russia:

In consequence of doubts which have arisen as to the interpretation of Article 6, section 10, of the Regulations respecting Contraband of War, it has been resolved by the Imperial Government that the articles capable of serving for a warlike object, and not specified in sections 1 to 9 of Article 6, as well as rice and food stuffs, shall be considered as contraband of war, if they are destined for—

The Government of the belligerent Power;

For its administration;

For its army;

For its navy;

For its fortresses;

For its naval ports; or

For its purveyors.

In cases where they are addressed to private individuals these articles shall not be considered as contraband of war.

In all cases horses and beasts of burden shall be considered as contraband of war. (Parliamentary Papers, Russia, No. 1 (1905), p. 27.)

In interpreting a contract entered into just before the Russo-Japanese war and involving the definition of contraband, the following statement was made by Chief Justice Berkley:

The contract was made in Hongkong, and therefore in the absence of evidence to the contrary which I could act upon the parties must be taken to have used the expression "contraband of war" in the sense in which it is understood in British courts of law, which is its sense in international law. It can not be successfully contended that provisions would be regarded by British courts of law as unconditional contraband of war, or that there is any likelihood that they will ever take that view. Had this court been asked at any time between the

signing of the charter party on the 10th of February, 1904, and the issuing of the Russian declaration to construe the meaning of the words "contraband of war" it can not be doubted that it would have excluded provisions from the category of unconditional contraband. It is contended, however, that the court ought to place a different meaning on that expression, after, and in view of, the terms of the Russian declaration, inasmuch as Russia, being a sovereign independent Power, has a prerogative right to declare whatever she pleases to be contraband of war in any war in which she may be engaged, and that the effect of the Russian declaration may be to make provisions unconditionally contraband, the master of the ship *Prometheus* was excused from loading them on his ship. In this contention I am unable to concur. In the view which I take of the effect of the Declaration under Treaty of Paris of 1856, and of the agreement undertaken by the several powers signatory thereto given in the Protocol No. 24 not to depart from the principles enunciated in the Declaration, I think that Russia was not at liberty to declare provisions unconditional contraband of war, and that her declaration in that respect could not affect the contract between the parties to this charter party, even supposing it could be held that contraband of war means, as used in the charter party, whatever Russia may consider as such, for Russia, having been a party to the solemn declaration of "fixed principles" under the Treaty of Paris, was not at liberty to disregard those principles and was therefore bound to recognize and act upon the generally accepted rule of international law that provisions are not unconditional contraband. (*The Osaka Shosen Kaisha* v. *The Prometheus.*)

It is evident that no unvarying list of articles contraband of war can be made. The progress of invention may make an article previously entirely innocent exceedingly dangerous to the belligerent if he allows it to be freely transported. The question always is, How essential is the article for carrying on the war? If it is essential, it may be declared contraband, e. g., in many wars sulphur and saltpeter have led the list of contraband because essential in the making of gunpowder and not readily obtained in all places. Charcoal, on the other hand, while essential, is readily obtainable and not classed as contraband.

The change in the method of warfare has made treatment of coal a matter of much moment. France did not regard coal as contraband in 1859 or in 1870, and other States took the same position. It may, however, easily become contraband by destination under the regulations of these States.

Certain coals, such as the Cardiff and Pocahontas, which

are peculiarly adapted for use on war vessels, will naturally be more liable to be treated as contraband than ordinary domestic coals.

G. G. Phillimore has recently said of the position of Russia in the Russo-Japanese war:

> The Russian attitude with regard to coal is in direct conflict with her declaration of 1884, at the West African Conference, that she would never recognize coal as contraband. While no doubt a State may define contraband differently on different occasions, to suit the particular circumstances of the warfare it is engaged in, it can not expect other States to acquiesce in its refusal to recognize the general rules governing the subject which it has formerly accepted and which stand on a basis of general acceptance in practice. (30 The Law Magazine and Review, p. 79.)

The Russian prize court at Vladivostok in 1904 condemned flour and railway materials consigned to merchants at Japanese ports on board the German vessel *Arabia*, and took similar action in regard to the British steamer *Calchas*. The goods on these vessels were consigned by United States merchants.

Secretary Hay protested against the seizure and condemnation, saying that—

> In view of its well-known attitude it should hardly seem necessary to say that the Government of the United States is unable to admit the validity of the judgment which appears to have been rendered in disregard of the settled law of nations in respect to what constitutes contraband of war. (Note August 30, 1904, Foreign Relations, p. 760.)

Two days earlier the British Government had stated that proof is necessary "that the goods are intended for the belligerent's naval or military forces before they can be considered as contraband."

The appeal in the case of the decision on the steamer *Calchas* was taken to the High Admiralty Court at St. Petersburg. That court handed down its decision on June 13, 1905. The decision does not directly recognize the category of conditional contraband; but, in justifying the seizure of the cotton and timber, maintains by an extended argument that there was fair evidence that the cotton was destined for the arsenal at Kobe, and that the timber was destined for Japanese military railways and telegraph,

thus introducing the principle of destination for enemy military use as a ground of condemnation.

In the recent report of the British Royal Commission on Supply of Food and Raw Material in Time of War is enunciated the following opinion formulated by Professor Holland:

> Provisions in neutral ships may be intercepted by a belligerent as contraband only when, being suitable for the purpose, they are on their way to a port of naval or military equipment belonging to the enemy, or occupied by the enemy's naval or military forces, or to the enemy's ships at sea, or when they are destined for the relief of a port besieged by such belligerent. (p. 24, sec. 101.)

Conclusion.—The position taken in the above extended discussions showing recent opinions as well as early decisions recognize the categories of absolute and conditional contraband and regard destination as the factor determining the innocent or belligerent character of certain goods. The recognition of such principles seems reasonable as regards belligerents and neutrals.

The following regulations in regard to contraband are therefore proposed:

CONTRABAND.

1. *Absolute contraband.*—When within or destined for the territory within the enemy's jurisdiction or for his military or naval use, the following articles are absolute contraband:

(*a*) Military materials, such as weapons, ammunition, etc.

(*b*) Instruments solely for use in warlike purposes, as machinery for the manufacture of military materials.

(*c*) Any other articles intended solely for use in war.

2. *Conditional contraband.*—When destined for the enemy's military or naval use, the following articles are contraband: Means of subsistence, fuel, means and material for transportation and communication on land or sea, money and other articles, such as cement, cotton, lumber, etc., of use either for warlike or for peaceful purposes.

Topic III.

(*a*) If the United States and Denmark were at war, and Great Britain neutral, would war vessels of Denmark be justified in visiting and searching British or other neutral vessels in the Red Sea?

(*b*) Should the right of visit and search be limited to a certain area in the neighborhood of the seat of war?

CONCLUSION.

(*a*) Denmark would be justified in visiting and, for good reason, in searching neutral vessels outside of neutral jurisdiction in the Red Sea.

(*b*) The area of the exercise of the right of visit and search should not be limited, but greater restrictions may justly be demanded against its exercise in an arbitrary and burdensome manner.

DISCUSSION AND NOTES.

Restriction of visit and search.—(*a*) If the United States and Denmark were at war, and Great Britain neutral, would war vessels of Denmark be justified in visiting and searching British or other neutral vessels in the Red Sea?

In the case of the *Maria*, in 1799, Sir William Scott states the general principle as follows:

> That the right of visiting and searching merchant ships upon the high seas, whatever be the ships, whatever be the cargoes, whatever be the destinations, is an incontestible right of the lawfully commissioned cruisers of a belligerent nation. (I. C. Robinson's Admirality Reports, 340.)

The action of Russia in visiting and searching neutral vessels in the Red Sea during the Russo-Japanese war of 1904–5 gave rise to much discussion. Frequently it was urged that the right of visit and search be abandoned altogether by belligerents as a right causing too great

inconvenience to neutrals and too seriously disorganizing commerce now of such vital importance to the world. Some maintain that the captured contraband would be "so trifling in quantity as to have no possible effect on the result of the war" or that the same ends could be served by less burdensome means than by visit and search. Various other objections also have been made.

The restriction of the right of search was positively advocated by Secretary Marcy, who said:

It is not inappropriate to remark that a due regard to the fair claims of neutrals would seem to require some modification, if not an abandonment, of the doctrine in relation to contraband trade. Nations which preserve the relations of peace should not be injuriously affected in their commercial intercourse by those which choose to involve themselves in war, provided the citizens of such peaceful nations do not compromise their character as neutrals by a direct interference with the military operations of the belligerents. The laws of siege and blockade, it is believed, afford all the remedies against neutrals that the parties to the war can justly claim. Those laws interdict all trade with the besieged or blockaded places. A further interference with the ordinary pursuits of neutrals, in nowise to blame for an existing state of hostilities, is contrary to the obvious dictates of justice. If this view of the subject could be adopted and practically observed by all civilized nations, the right of search, which has been the source of so much annoyance and of so many injuries to neutral commerce, would be restricted to such cases only as justified a suspicion of an attempt to trade with places actually in a state of siege or blockade.

Humanity and justice demand that the calamities incident to war should be strictly limited to the belligerents themselves and to those who voluntarily take part with them; but neutrals abstaining in good faith from such complicity ought to be left to pursue their ordinary trade with either belligerent, without restriction in respect to the articles entering into it.

Though the United States do not propose to embarrass the other pending negotiations relative to the rights of neutrals by pressing this change in the law of contraband, they will be ready to give it their sanction whenever there is a prospect of its favorable reception by other maritime powers. (Senate Ex. Doc., 34th Cong., 1st sess., No. 104, p. 13.)

Admiral Réveillère has recently said:

Le droit de fouiller les neutres est absolument incompatible avec les besoins de circulation des neutres. Le droit de visite est un dernier vestige des temps de petite industrie. (Journal des Économistes, Sept., 1904, p. 395.)

It may be pointed out that the inconvenience of the exercise of the right of visit and search of an innocent vessel should be of very little moment if the right is properly exercised. Further, the innocent neutral would properly have claim for damages in case visit and search is not properly conducted.

The Japanese regulations relating to capture at sea, of March 7, 1904, make specific provisions for the protection of neutrals:

ART. LI. In visiting or searching a vessel the captain of the man-of-war shall take care not to divert her from her original course more than necessary, and as far as possible not to give her inconvenience.

ART. 62. The boarding officer, before he leaves the vessel, shall ask the master whether he has any complaint regarding the procedure of visiting or searching or any other points; and if the master makes any complaints he shall request him to produce them in writing.

The claim that visit and search disorganizes commerce has probably received more weight than the facts in a properly conducted war would justify. A properly conducted visit and search of an innocent neutral vessel would certainly interfere very little with commerce. Articles which are absolutely contraband of war form a very small portion of an ordinary cargo. The disorganization consequent on the checking of such shipments would accordingly be small. The main interruption of commerce is in the line of articles which may be classed as conditional contraband. These articles, such as foodstuffs, fuel, etc., form a large part of ordinary trade, but the present position is that such articles are liable to seizure only when destined for the military use of the enemy. In transporting such articles for such purpose the neutral is aware of his risk and assumes it in the hope of greater gain and usually pays a corresponding rate of insurance. It is true that war interferes with commerce in conditional contraband, and that commerce in the same goods to the same ports might in time of peace be very large. War does cause inconvenience to neutrals and may cause loss of trade. The denial of the right of a belligerent, except by blockade, to prevent supplies from reaching his opponent's forces because such supplies are sailing to his opponent

under a neutral flag would certainly be one of the most effective means of prolonging a war. Humanity demands that wars shall be as short as possible. A neutral's desire for the profits of commerce should not be put before the claims of humanity. The rights of neutrals should, however, be carefully protected in the exercise of visit and search and seizure and legitimate commerce should receive the most liberal treatment.

The argument that the contraband is "so trifling in quantity as to have no possible effect on the result of the war," can not weigh against the practical consideration that the "quantity" is not necessarily a matter of so great importance in military operations as is the timeliness of a particular article in meeting a need. It may happen that a little more ammunition, coal, food, or supplies of some kind may turn defeat into victory. A little more ammunition may enable a belligerent to hold out till reenforcements arrive; a little more coal may enable a vessel to pursue and capture an enemy; a telegraphic outfit may make possible communications which determine the issue of the war. Though quantity may be trifling, and small quantities are the rule in some articles, this amount may be no less vital for the successful prosecution of the war.

The right of visit and search is not merely a right exercised to determine the presence of contraband or guilt in regard to blockade, but is still more essential in order that the belligerent may be convinced as to the nature and character of the vessel. The belligerent has a right to learn for himself whether the vessel flying a neutral flag really is a properly documented neutral vessel.

In general, as the neutral is supposed to refrain from all participation in the war, he can not complain if the belligerents take reasonable precautions to prevent participation.

A careful consideration of the grounds of objection to the exercise of the right of visit and search seems to show that the objection is rather to the method than to the visit and search itself. To objections to the method full weight should be given. Improper methods and careless exercise

of this supervision of neutral commerce is of no advantage to the belligerent and may work great disadvantage to the neutral. Nothing can be said in support of an act that brings only injury to the neutral and no benefit to the belligerent, but in some cases the direct disadvantage of making payment for the improper act. Recent court decisions have shown that prize courts are inclined to regard reasonable neutral rights even against actions of their own commanders.

The right of visit and search is now generally admitted, and visit is not now considered an offense by a neutral, provided the visit is properly conducted. Up to the seventeenth century the exercise of this right was often regarded as in derogation of the dignity of the sovereignty of the neutral vessel visited. For a time the exercise of the right of search was permitted under treaty provisions. Later it was regarded as generally admitted, and treaty provisions merely prescribe the method of exercise of the right. (Treaty United States and Italy, 1871.)

Sir William Scott, in the case of the *Maria* in 1799 (1 C. Robinson's Admiralty Reports, 340), speaking of the law of nations applying to visit, search, and capture, says:

> I state a few principles of that system of law which I take to be incontrovertible.
>
> 1. That the right of visiting and searching merchant ships upon the high seas, whatever be the ships, whatever be the cargoes, whatever be the destinations, is an incontestible right of the lawfully commissioned cruisers of a belligerent nation. I say, be the ships, the cargoes, and the destinations what they may, because till they are visited and searched it does not appear what the ships, or the cargoes, or the destinations are, and it is for the purpose of ascertaining these points that the necessity of this right of visitation and search exists. This right is so clear in principle that no man can deny it who admits the legality of maritime capture, because if you are not at liberty to ascertain by sufficient inquiry whether there is property that can be legally captured it is impossible to capture.

Judge Story asserts the acceptance of Lord Stowell's position by the United States, affirming that visit and search "is allowed by the general consent of nations in the time of war and limited to those occasions." (The *Marianna Flora*, 11 Wheaton, U. S. Reports, 1.)

Method and scope of visit and search.—The general object of the exercise of this right is to secure from the neutral observance of neutrality. The method is prescribed in the rules governing naval operations.

The general position is that the right can be exercised—

1. By the properly commissioned vessels.
2. Over neutral private vessels.
3. On the high seas and at other points outside neutral jurisdiction.

The British Regulations are as follows: (Manual of Naval Prize Law, Holland, Chaps. I and II.)

Chapter I.

POWERS.

1. The powers with which the Commander of one of Her Majesty's cruisers is invested for the purpose of making Lawful Prize in time of war are those of—

Visit.
Search.
Detention (with a view to Adjudication).

IN WHAT WATERS EXERCISABLE.

2. These powers may be exercised in any Waters except the Territorial Waters of a Neutral State. The Territorial Waters of a State are those within three miles from low-water mark of any part of the Territory of that State, or forming bays within such Territory, at any rate in the case of bays the entrance to which is not more than six miles wide.

3. These powers may not be exercised over a vessel in Neutral Territorial Waters, although she may have been beyond those limits when first descried or chased.

4. The Commander may not use Neutral Territorial Waters as an habitual War Station, whence to sally out with his Ship or Boats and exercise the powers of Visit, Search, or Detention upon vessels lying beyond the limits of such Waters. [a] But he may pass over Neutral Territorial Waters in order to effect a Capture beyond, provided they are not Waters which can not usually be passed through without express permission.

5. Sometimes it happens that, after capturing a Vessel, the Commander ascertains that the Capture was made in Neutral Territorial Waters. In such case he should release her, if an express application is made by the Authorities of the Neutral Territory for her restoration.

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[a] Twee Gebroeders, 3 C. Rob., 162.

OVER WHAT SHIPS EXERCISABLE.

6. These powers may be exercised over any Private Vessel, whatever may be her Nationality, but not over any Ship belonging to the Public Navy of a friendly Power.

7. No Vessel is exempt from the exercise of these powers on the ground that she is under the Convoy of a Neutral Public Ship.

REASONS FOR EXERCISING.

8. The power of Visit should be exercised only over Vessels which the Commander of Her Majesty's Cruiser has some reason to believe are liable to Detention, either as being the property of Enemies or as being engaged in a prohibited trade or service.

9. The Vessels thus liable to Detention are (subject to the explanations and exceptions contained in Chapters III–XI).

I. Any Enemy Vessel, irrespectively of her destination or cargo. (See Chapter III.)

II. Any British Vessel, or Vessel of an Ally, trading with, or acting in the service of, the Enemy. (See Chapter IV.)

III. Any Neutral Vessel engaged in—

(1) Carriage of Contraband. (See Chapter VI.)

(2) Acting in the service of the Enemy. (See Chapter VII.)

(3) Breach of Blockade. (See Chapter VIII.)

Except in these three cases, to which, under certain circumstances, others (see Chapters IX–XI) may possibly be added by special instructions, Neutral Vessels are free to trade with the enemy.

10. Any Vessel is also liable to Detention, irrespectively of her national character or the trade in which she is engaged, for—

(1) Resistance to Visit or Search. (See Chapter XIII.)

(2) Sailing under Neutral Convoy which resists. (Ibid.)

(3) Sailing under Enemy Convoy. (Ibid.)

(4) Deficiency in Ship Papers. (See Chapter XIV.)

PROCEDURE TO BE OBSERVED IN EXERCISING.

11. Visit, Search, and Detention must be exercised in accordance with the established course of Procedure. (See Chapters XV–XIX.)

SENDING IN FOR ADJUDICATION.

12. When a Vessel has been detained she should be sent, with the accustomed precautions, to a Port of Adjudication; and upon her arrival there proceedings should be commenced with a view to her being duly condemned by a Prize Court. (See Chapters XX–XXII.)

Chapter II.

RESPONSIBILITY FOR EXERCISE OF POWERS.

13. In the exercise of the powers of Visit, Search, and Detention, great discretion will be required. The war has to be prosecuted with zeal, but at the same time care must be taken not to subject to any

vexatious interference the commerce of Great Britain or her Allies, or of any other nation not engaged in the war.

14. The Commander should be careful on all occasions to observe strict propriety of conduct toward the masters and Crews of Vessels with whom, in the exercise of these powers, he may be brought into contact, and should impress the same duty upon the Officers and men under his command.

15. If a Commander in the exercise of these powers detain a Vessel without probable cause, or do an act not sanctioned by international law or otherwise unwarrantable, he will incur the displeasure of Her Majesty's Government, and will also be personally liable for damages.

16. The Commander is likewise responsible in damages for the acts of all under his command, whether he himself is present or absent; and this responsibility is not shifted upon his Superior Officer (as the Commander of the Squadron or of the Fleet), unless such Superior Officer be actually present and cooperating, or has issued express orders for the doing of the act in question.[a]

17. Even although the Vessel and Cargo be condemned as Lawful Prize, the Captors may be deprived by the Prize Court of all interest in the same, if in relation to the Vessel or her Cargo, or any person on board, they have committed any offense against the Law of Nations, or against the Naval Prize Act, 1864, or against any Act relating to Naval Discipline, or against any order in Council or Royal Proclamation, or any breach of Her Majesty's Instructions relating to Prize, or any act of Disobedience to the Orders of the Lords of the Admiralty, or to the Command of a Superior Officer.[b]

Great Britain found in 1900, during the South African war, that visit and search exercised without greatest discretion might be very annoying to the belligerent as well as for the neutral, and the admiralty drafted the following instruction:

Owing to the extreme difficulty of proving, at ports so distant from South Africa as Aden and Perim, the real destination of contraband of war carried by ships calling at or passing those ports, the Senior Naval Officer, Aden, is to be directed to discontinue searching such vessels, confining himself to reporting to the Commander in chief, Cape, the names and dates of clearance of suspected ships.

Chapter V of the Japanese regulations relating to Capture at Sea gives a late statement of the "grounds for visit, search, and seizure." Its provisions are as follows:

ART. XXXII. Any private vessel regarding which there is suspicion which would justify her capture shall be visited and searched, no matter of what national character she is.

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[a] Mentor, 1 C. Rob., 179; *Eleanor*, 2 Wheat., 345.

[b] Naval prize act, 1864, sec. 37.

ART. XXXIII. A neutral vessel under convoy of a war vessel of her country shall not be visited nor searched if the commanding officer of the convoying war vessel presents a declaration signed by himself, stating that there is on board the vessel no person, document, or goods that are contraband of war, and that all the ship's papers are perfect, and stating also the last port which the vessel left and her destination. In case of grave suspicion, however, this rule does not apply.

ART. XXXIV. In visiting or searching a neutral mail ship, if the mail officer of the neutral country on board the ship swears, in a written document, that there are no contraband papers in certain mail bags, those mail bags shall not be searched. In case of grave suspicion, however, this rule does not apply.

ART. XXXV. All enemy vessels shall be captured. Vessels belonging to one of the following categories, however, shall be exempted from capture if it is clear that they are employed solely for the industry or undertaking for which they are intended:

1. Vessels employed for coast fishery.
2. Vessels making voyage for scientific, philanthropic, or religious purposes.
3. Light-house vessels and tenders.
4. Vessels employed for exchange of prisoners.

ART. XXXVI. Any vessel of the Empire which carries on commerce with the enemy State or its subjects, or makes voyage with such intention, shall be captured, unless such vessel has no knowledge of the outbreak of war or has permission from the Imperial Government.

ART. XXXVII. Any vessel that comes under one of the following categories shall be captured, no matter of what national character it is:

1. Vessels that carry persons, papers, or goods that are contraband of war.
2. Vessels that carry no ship's papers, or have willfully mutilated or thrown them away, or hidden them, or that produce false papers.
3. Vessels that have violated a blockade.
4. Vessels that are deemed to have been fitted out for the enemy's military service.
5. Vessels that engage in scouting or carry information in the interest of the enemy, or are deemed clearly guilty of any other act to assist the enemy.
6. Vessels that oppose visitation or search.
7. Vessels voyaging under the convoy of an enemy's man of war.

ART. XXXVIII. Vessels carrying contraband persons, papers, or goods, but which do not know the outbreak of war, shall be exempt from capture.

The fact that the master of a vessel does not know the persons, papers, or goods on board to be contraband of war, or that he took them on board under compulsion, shall not exempt the vessel from capture.

ART. XXXIX. Vessels that come under one of the following cases may be captured, no matter of what national character they are:

1. When a vessel does not produce the necessary papers or they are not kept in good order.

2. When there are contradictions among the ship's papers or between the statements of the master and the ship's papers.

3. Besides the above cases when, as the result of visitation or search, there is sufficient suspicion to justify capture according to Articles from XXXV to XXXVII.

In the treaty between the United States and Italy of February 26, 1871, there is provision for the regulation of visit and search.

ARTICLE XVIII. In order to prevent all kinds of disorder in the visiting and examination of the ships and cargoes of both the contracting parties on the high seas, they have agreed mutually that whenever a vessel of war shall meet with a vessel not of war of the other contracting party the first shall remain at a convenient distance and may send its boat with two or three men only in order to execute the said examination of the papers concerning the ownership and cargo of the vessel without causing the least extortion, violence, or ill treatment, and it is expressly agreed that the unarmed party shall in no case be required to go on board the examining vessel for the purpose of exhibiting his papers, or for any other purpose whatever.

ARTICLE XIX. It is agreed that the stipulations contained in the present treaty relative to the visiting and examining of a vessel shall apply only to those which sail without a convoy; and when said vessels shall be under convoy the verbal declaration of the commander of the convoy, on his word of honor, that the vessels under his protection belong to the nation whose flag he carries, and, when bound to an enemy's port, that they have no contraband goods on board shall be sufficient. (Compilation of Treaties in Force, p. 455.)

The principles were well set forth by Count von Bülow in a speech in the Reichstag on January 19, 1900. He said:

We recognize the rights which the law of nations actually concedes to belligerents with regard to neutral vessels and neutral trade and traffic. We do not ignore the duties imposed by a state of war upon the shipowners, merchants, and vessels of a neutral State, but we require of the belligerents that they shall not extend the powers they possess in this respect beyond the strict necessities of the war. We demand of the belligerents that they shall respect the inalienable rights of legitimate neutral commerce, and we require above all things that the right of search and of the eventual capture of neutral ships and goods shall be exercised by the belligerents in a manner conformable to the maintenance of neutral commerce, and of the relations of neutrality existing between friendly and civilized nations." (Parliamentary Papers, Africa, No. 1 (1900), p. 25.)

Some recent opinions of the United States Court of Claims set forth the nature of the right:

The right of visitation and search of neutral vessels at sea is a belligerent right, essential to the exercise of the right of capturing enemy's property, contraband of war, and vessels committing a breach of blockade. It is essential, in order to determine whether the ships themselves are neutral and documented as such, according to the law of nations and treaties, even if the right of capturing enemy's property be ever so strictly limited. (The *Jane*, 37 U. S. Court of Claims, 24, Dec. 2, 1901.)

In the case of the *Nancy* it was stated that—

The right of search is preliminary to the right of seizure, and the right of seizure depends upon the result of the exercise of the right of search. * * * even though there may be a legal seizure, it is the duty of the seizing vessel to follow such legal seizure by affording to the captured party all facilities of defense to which he may be entitled. (The *Nancy*, 37 U. S. Court of Claims, 401.)

In the case of the *Jane* mentioned above it is also further stated that—

The object of searching ostensible neutrals is to get evidence as to the fact of neutrality, and if the cargo be not enemy's property; or if neutral, whether they are carrying contrabrand; or whether the vessels are in the service of the enemy in the way of carrying military persons or dispatches or sailing in prosecution of an intent to break blockade.

A case showing an evident intent to go beyond the regular rules in regard to visit, and search, and seizure occurred during the Russo-Japanese war of 1904–5. This was the case of the *Allanton*.

Mr. Lawrence states the case of the *Allanton* as follows:

On January 5 of the present year (1904) the *Allanton*, a British vessel registered at Glasgow, and owned by Mr. W. R. Rea, of Belfast, was chartered to take a cargo of Cardiff coal to Hongkong or Sasebo. On February 21 she left Cardiff. At Gibraltar the captain received orders by telegraph on February 24 to go round the Cape instead of through the Suez Canal. On May 10 he reached Hongkong and there found instructions to proceed to Sasebo. Having discharged his cargo in the latter port he went to Muroran, in the island of Hokkaido, where the ship was chartered by a Japanese company to carry a fresh cargo of coal to Singapore. It was consigned to the British firm of Paterson, Simons & Co., and was a part of a large quantity of 50,000 tons which they had agreed to take during the present year. The *Allanton* left Muroran on June 13, and three days later was captured by a Russian squadron near the Okishima Islands. A prize crew was put on board her and she was taken to Vladivostok, where she arrived on June 19.

After two days, and before the case was decided by the local prize court, the authorities commenced to discharge her cargo, a proceeding suggestive of a determination to find or make grounds for condemning her. Whether this suspicion be just or not, as a matter of fact she was condemned. The judgment of the court was given on June 24, and four days after an appeal was lodged against it. (War and Neutrality in the Far East, 2d ed., p. 222.)

The decision of the Russian prize court at Vladivostok condemned the *Allanton* because (1) the vessel had brought contraband to a Japanese port on its outward journey, (2) various insignificant circumstances "and the character of the cargo (coal) convinces the court that the real destination of this hostile cargo was by no means Singapore, but a Japanese or Korean port, or even the enemy's fleet maneuvering in the sea," and (3) the cargo was enemy property.

It may be said that the general principle of international law is to the effect (1) that the offense of carriage of contraband is deposited with the goods, (2) that there must be ample evidence rather than suspicion of intent as to hostile destination, and (3) that enemy's goods, even though contraband when bound for enemy destination, are not such when under a neutral flag bona fide bound for a neutral destination.

The Vladivostok decision in regard to the *Allanton* was contested and an appeal was taken to the Admiralty council at St. Petersburg. On October 22, 1904, the decision of the prize court at Vladivostok was annulled by the Admiralty council and ship and cargo were ordered released.

Limitations on visit and search.—It does not seem to be questioned that one limitation should be placed on visitation and search in general, viz: that issued by the United States in 1898:

The voyages of mail steamers are not to be interfered with except on the clearest grounds of suspicion of a violation of law in respect of contraband or blockade.

To the above, article 34 of the Japanese regulations corresponds.[a] Doubtless it would be well to add to the United States rule a clause which excepts vessels guilty of unneutral service.

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[a] See p. 56.

It may also be said that pending the decision of a prize court the captured vessel's cargo should remain, so far as possible, in the same condition as at the time of capture.

Conclusion.—It may be safely said that at points outside of neutral jurisdiction in the Red Sea the right of visit and search may be exercised. It is, however, a right of war. Operations should be directed against the enemy, only. Therefore the exercise of the right of visitation and search should be exercised in such a manner as to interfere so little as possible with legitimate commerce of neutrals. If the papers are regular, only grave reasons would justify the breaking of the cargo and search of a great liner on its regular voyage, as this would be of great inconvenience and possible loss to neutral commerce. It is suggested that a system of neutral government inspection and guarantee be introduced to guard against the inconveniences of such interference.

The right of visitation and search is generally admitted. The question of its exercise in a given case, however, must often be one of policy.

Area of permissible visit and search.—(*b*) Should the right of visit and search be limited to a certain area in the neighborhood of the seat of war?

While the right of visit and search is generally recognized, there may arise a question as to the place of its exercise. There are certain restrictions well established in limitation of the method of search. In considering the question of place it is supposed that there is no question as to the propriety of the method.

Propositions have been made to the effect that the area of the field of possible exercise of the right of search should be circumscribed; that visit and search of neutral vessels should be permitted only within a certain distance of the seat of war or within a certain distance of the belligerent territory. It has been proposed to limit the exercise of the right of search to the area within the radius of 100 miles from the belligerent ports. Any attempt at limitation of area would seem to be action which would introduce new complications into the conduct of maritime warfare.

The difficulty of determining disputes in regard to distance would make such a restriction hard to enforce. The courts would not care to have such additional complications introduced into questions upon which they must decide.

The 100 mile radius would create a quasi blockaded area in which neutrals would be liable to the exercise of extended belligerent rights.

It would introduce new practices which would bear very heavily on neutral states, neighbors to belligerent states. It might easily happen and would often be the case that this limitation of area of the exercise of the right of search would bring about a restriction on the commerce to a given part of the neutral country which chanced to be within the area of search, or practically close by discrimination a neutral port.

It would work general hardship upon the neighboring neutral which would be unnecessary and would bring no commensurate advantage to the belligerent.

This limitation would restrict belligerent operations to a narrower field, which might in some respects be advantageous. Yet, visitation and search properly exercised may be but little onerous to the neutral. The limitation of area of visit and search would be very burdensome to the belligerent. There seems to be in general no reason for such limitation which in practice would introduce new difficulties in enforcement.

Conclusion as to limitation of area.—All the advantages of the proposed limitation of area may better be obtained through the more judicious exercise of the right and the more careful attention by neutrals to the proper documenting of their vessels.

General conclusions.—(*a*) Denmark would be justified in visiting and for good reason in searching neutral vessels outside of neutral jurisdiction in the Red Sea.

(*b*) The area of the exercise of the right of visit and search should not be limited, but greater restrictions may justly be demanded against its exercise in an arbitrary and burdensome manner.

Topic IV.

Should the destruction of captured vessels be allowed before adjudication by a prize court? If so, under what condition?

CONCLUSION.

Enemy vessels.—If there are controlling reasons why enemy vessels may not be sent in for adjudication, as unseaworthiness, the existence of infectious disease, or the lack of a prize crew, they may be appraised and sold, and if this can not be done may be destroyed. The imminent danger of recapture would justify destruction, if there was no doubt that the vessel was good prize. But in all such cases all the papers and other testimony should be sent to the prize court, in order that a decree may be duly entered.

Neutral vessels.—If a seized neutral vessel can not for any reason be brought into port for adjudication, it should be dismissed.

DISCUSSION AND NOTES.

Two kinds of prize.—Prize may be of two kinds—

(1) Enemy property, or

(2) Neutral property.

The destruction of enemy property is a matter quite different from the destruction of neutral property. The destruction of an enemy vessel may involve the destruction of neutral property, and at the present time comparatively few cargoes belong wholly to citizens of a single state.

Cases involving the destruction of captures.—During the Revolutionary war captured vessels were regularly destroyed. During the war of 1812, also, it was the general practice to destroy captured enemy vessels; indeed, the

officers were instructed that unless their prizes were "very valuable and near a friendly port, it will be imprudent and worse than useless to attempt to send them in." The Confederate cruisers habitually destroyed captures during the civil war of 1861. The ground of destruction was asserted to be the impossibility of taking these prizes to home ports for adjudication. The burning of the German vessels *Ludwig* and the *Vorwarts* by a French cruiser October 21, 1871, was upheld by the French courts.

The cases most frequently cited are those of the *Actèon*, in 1815 (2 Dodson's Admiralty Reports, p. 48), and the *Felicity*, in 1819 (ibid., p. 381). In both these instances the vessels were property of subjects of one of the belligerent states. They were sailing under license of the other belligerent. In the case of the *Felicity* the belligerent which had granted the license destroyed the vessel holding the license. The *Felicity*, which was destroyed, was a merchant ship of the United States sailing under a British license and destroyed by a British war vessel, but the license was not produced till the *Felicity* was already on fire.

Of this case Lord Stowell said:

> Taking this vessel and cargo to be merely American the owners could have no right to complain of this act of hostility, for their property was liable to it in the character it bore at that period of enemy's property. There was no doubt that the *Endymion* had a full right to inflict it, if any grave call of public service required it. Regularly a captor is bound by the law of his own country, conforming to the general law of nations, to bring in for adjudication in order that it may be ascertained whether it be enemy's property; and that mistakes may not be committed by captors, in the eager pursuit of gain, by which injustice may be done to neutral subjects and national quarrels produced with the foreign states to which they belong. Here is a clear American vessel and cargo, alleged by the claimants themselves to be such, and consequently the property of enemies at that time. They share no inconvenience by not being brought in for the condemnation, which must have followed if it were mere American property; and the captors fully justify themselves to the law of their own country, which prescribes the bringing in, by showing that the immediate service in which they were engaged—that of watching the enemy's ship of war—the *President*, with intent to encounter her, though of inferior force, would not permit them to part with any of their own crew to carry her into a British port. Under this collision of duties nothing was left but to destroy her, for they could not, con-

sistently with their general duty to their own country or, indeed, its express injunctions, permit enemy's property to sail away unmolested. If impossible to bring in their next duty is to destroy enemy's property. Where doubtful whether enemy's property and impossible to bring in, no such obligation arises, and the safe and proper course is to dismiss. Where it is neutral the act of destruction can not be justified to the neutral owner by the gravest importance of such an act to the public service of the captor's own state; to the neutral it can only be justified, under any such circumstances, by a full restitution in value. These are rules so clear in principle and established in practice that they require neither reasoning nor precedent to illustrate or support them.

Before the time of Sir William Scott it had been generally regarded as legitimate and as doing the neutral no injustice to destroy his captured property, provided full remuneration was paid. Lord Stowell's later decisions seem to incline far more toward absolute prohibition of destruction of neutral vessels.

In the case of the *Dos Hermanos*, in 1825, Mr. Chief Justice Marshall delivered the opinion of the court, that—

whatever might have been the ancient doctrine in England in respect to capture in war, it is now clearly established in that kingdom that all captures *jure belli* are made for the Government, and that no title of prize can be acquired but by the public acts of the Government conferring rights on the captors. (10 Wheaton's U. S. Supreme Court Reports, 306.)

In the case of the *Leucade*, in 1855, Dr. Lushington stated:

The general rule, therefore, is that if a ship under neutral colors be not brought to a competent court for adjudication the claimants are, as against the captor, entitled to costs and damages. Indeed, if the captor doubt his power to bring a neutral vessel to adjudication it is his duty to release her.

Regulations in regard to destruction before adjudication.—In the British Manual of Naval Prize Law, edited by Professor Holland in 1888, it is provided—

303. In either of the following cases:

(1) If the Surveying Officers report the Vessel not to be in a condition to be sent in to any port for Adjudication; or

(2) If the Commander is unable to spare a Prize Crew to navigate the Vessel to a Port of Adjudication the Commander should release the Vessel and Cargo without ransom, unless there is clear proof that she belongs to the Enemy.

304. But if in either of these cases there be clear proof that the

Vessel belongs to the Enemy, the Commander should remove her Crew and papers, and, if possible, her Cargo, and then destroy the Vessel. The Crew and the Cargo (if saved) should then be forwarded to a proper Port of Adjudication, in charge of a Prize Officer, together with the Vessel's Papers and the necessary Affidavits. Among the Affidavits should be one, to be made by the Prize Officer, exhibiting the evidence that the Vessel belonged to the Enemy, and the facts which rendered it impracticable to send her in for Adjudication (p. 86).

In an address on April 12, 1905, Professor Holland refers to this rule of the Admiralty Manual of 1888. He says:

While it is, on principle, most undesirable that neutral property should be exposed to destruction without inquiry, cases may occasionally occur in which a belligerent could hardly be expected to permit the escape of such property, though he is unable to send it in for adjudication. The contrary opinion is, I venture to think, largely derived from a reliance upon detached paragraphs in one of Lord Stowell's judgments on the subject—judgments which, taken together, show little more than that, in his view, no plea of national interest will bar the claim of a neutral owner to be fully compensated for the value of his property when it has been destroyed without judicial proof of its noxious character. "Where doubtful whether enemy's property, and impossible to bring in, the safe and proper course," says Lord Stowell, "is to dismiss." The Admiralty Manual of 1888 accordingly directs commanders who are unable to send in their prizes to "release the vessel and cargo without ransom, unless there is clear proof that she belongs to the enemy." This indulgence can hardly, however, be proclaimed as an established rule of international law, in the face of the fact that the sinking of neutral prizes is under certain circumstances permitted by the prize codes, not only of Russia, but also as of such powers as France, the United States, and Japan (1904). (83 Fortnightly Review, 802.)

The Japanese regulations in the Chino-Japanese war of 1894 provide in article 22 that—

If the enemy's vessels are unfit to be sent to a port, as stated in Article 18, the commander should break up the vessels, after taking the crew, the ship's papers, and the cargo, if possible, into his ship. The crew, the ship's papers, and the cargo should be sent to a port, as stated in Article 18. (Takahashi, International Law During the Chino-Japanese War, p. 183.)

The Japanese regulations of March 7, 1904, are general in character. Article XCI provides:

In the following cases, and when it is unavoidable, the captain of the man-of-war may destroy a captured vessel, or dispose of her ac-

cording to the exigency of the occasion. But before so destroying or disposing of her he shall transship all persons on board and, as far as possible, the cargo also, and shall preserve the ship's papers and all other documents required for judicial examination:

1. When the captured vessel is in very bad condition and can not be navigated on account of the heavy sea.

2. When there is apprehension that the vessel may be recaptured by the enemy.

3. When the man-of-war can not man the prize without so reducing her own complement as to endanger her safety.

The United States instructions to blockading vessels and cruisers in 1898 does not specifically restrict destruction to enemy vessels. In article 28 is the provision that—.

If there are controlling reasons why vessels may not be sent in for adjudication, as unseaworthiness, the existence of infectious disease, or the lack of a prize crew, they may be appraised and sold; and if this can not be done they may be destroyed. The imminent danger of recapture would justify destruction if there was no doubt that the vessel was good prize. But in all such cases all the papers and other testimony should be sent to the prize court, in order that a decree may be duly entered. (General Order 492, June 20, 1898.)

According to the treaty stipulations between the United States and Italy of February 26, 1871, it would not be a light matter for a United States commander to destroy an Italian vessel. Article XX provides:

In order effectually to provide for the security of the citizens and subjects of the contracting parties, it is agreed between them that all commanders of ships of war of each party, respectively, shall be strictly enjoined to forbear from doing any damage to, or committing any outrage against, the citizens or subjects of the other or against their vessels or property; and if the said commanders shall act contrary to this stipulation they shall be severely punished and made answerable in their persons and estates for the satisfaction and reparation of said damages of whatever nature they may be. (Compilation of Treaties in Force, p. 455.)

The Russian rules in regard to maritime prizes, of March 27, 1895, approved by the admiralty board September 20, 1900, allow the destruction of captured vessels under certain circumstances.

Art. 21. Dans les cas extraordinaires où la conservation du bâtiment capturé sera reconnue impossible par suite du mauvais état dans lequel il se trouve, de son peu de valeur, du danger qu'il court d'être repris par l'ennemi, du fait que les ports sont trop éloignés ou bloqués, qu'il constitue un embarras pour le bâtiment capteur ou un obstacle au

succes de ses opérations, le commandant est autorisé, sous sa responsabilité personnelle, à bruler ou à couler sa capture, après avoir transbordé les hommes et autant que possible le chargement et avoir pris les mesures voulues pour conserver les papiers et objets qui se trouvent à bord et qui pourraient être nécessaires pour éclairer l'affaire lors qu'elle sera examinée conformément à la procédure des prises. Le commandant dresse, d'après l'article 21 du code maritime, procès-verbal des circonstances qui ont motivé la destruction du bâtiment capturé.

Article 40 of the Russian instructions of 1901 provides that—

In the following and other similar extraordinary cases the commander of the imperial cruiser has the right to burn or sink a detained vessel after having previously taken therefrom the crew, and, as far as possible, all or part of the cargo thereon, as well as all documents and objects that may be essential in elucidating the matter in the prize court:

(1) When it is impossible to preserve the detained vessel on account of its bad condition.

(2) When the danger is imminent that the vessel will be recaptured by the enemy.

(3) When the detained vessel is of extremely little value, and its conduct into port requires too much waste of time and coal.

(4) When the conducting of the vessel into port appears difficult owing to the remoteness of the port or a blockade thereof.

(5) When the conducting of the detained vessel might interfere with the success of the naval war operations of the imperial cruiser or threaten it with danger.

The commander prepares a memorandum under his signature and that of all the officers concerning the circumstances which have led him to destroy the detained vessel, which memorandum he transmits to the authorities at the earliest possible moment.

NOTE.—Although Article 21 of the Regulations on Maritime Prizes of 1895 permits a detained vessel to be burned or sunk "on the personal responsibility of the commander," nevertheless the latter by no means assumes such responsibility when the detained vessel is actually subject to confiscation as a prize, and the extraordinary circumstances in which the imperial vessel finds itself absolutely demand the destruction of the detained vessel. (U. S. Foreign Relations, 1904, p. 752.)

Russian instructions of August 5, 1905, were to the effect that—

Russian vessels were not to sink neutral merchantmen with contraband on board in the future, except in case of direst necessity, but in cases of emergency to send prizes into neutral ports.

The Institute of International Law at Turin in 1882 provided for the destruction of an enemy's vessel—

(1) If unseaworthy.

(2) If unable to accompany the fleet.

(3) If there is danger from a superior force of the enemy.

(4) If the captor can not without danger spare a prize crew, and

(5) If the port to which the vessel should be conducted is too remote. (Annuaire 1883, p. 221.)

From these discussions it seems to be evident that the destruction of an enemy vessel is permitted under certain restrictions.

Neutral restriction of entrance of prize.—The hospitality once accorded to prize has gradually lessened. Formerly prizes were admitted to neutral ports, but in recent years neutrality proclamations have often forbidden the privilege. The British proclamation of 1898 says:

> Armed ships of either belligerent are interdicted from carrying prizes made by them into the ports, harbors, roadsteads, or waters of the United Kingdom, the Isle of Man, the Channel Islands, or any of Her Majesty's colonies or possessions abroad.

An identical position was taken on February 10, 1904, in consequence of the Russo-Japanese war.

The regulations for the Netherlands Indies during the Russo-Japanese war of 1904–5 provide that—

> Warships or privateers shall not be admitted to the harbors or outlets of the Netherlands when accompanied by prizes, except in the case of distress or want of provisions. As soon as the reason for their entry is passed they shall leave immediately. They shall not ship more provisions than is necessary for them to reach the nearest harbor of the country to which they belong, or that of one of their allies in the war. So long as they keep their prizes coal shall not be supplied them. When warships pursued by the enemy shall seek shelter in Netherlands Indies waterways, they shall abandon their prizes.

The Danish proclamation of neutrality of February 10, 1904, reads:

> Prizes must not be brought into a Danish harbor or roadstead except in evident case of stress, nor must prizes be condemned or sold therein.

The French proclamations of neutrality in the Spanish-American war in 1898 and in the Russo-Japanese war in 1904 were identical in providing:

> The Government decides in addition that no ship of war of either belligerent will be permitted to enter and to remain with her prizes in the harbors and anchorages of France, its colonies and protectorates, for more than twenty-four hours, except in the case of forced delay or justifiable necessity.

This general tendency to prohibit the entrance of prizes into neutral ports makes the disposition of prizes taken at a distance from the home country a serious question. The difficulty of bringing the prizes in for adjudication would often be so great as to make capture useless. If the belligerent must generally bring captures before the prize court, the very burden of this bringing in the captured vessels would tend to lessen the frequency of such captures. There would be at the same time a greater incentive toward the destruction of vessels which it might be advantageous to the belligerent to destroy, for such vessels being denied entrance to neutral ports, and being remote from a home port, must be destroyed or released.

Opinions in regard to destruction of captured vessels.—Sir Robert Phillimore says:

> If a neutral ship be destroyed by a captor, either wantonly or under alleged necessity, in which she herself was not directly involved, the captor, or his government, is responsible for the spoliation. The gravest importance of such an act to the public service of the captor's own state will not justify its commission. The neutral is entitled to full restitution in value. (International Law, III, CCXXXIII.)

Walker makes the general statement that—

> In certain cases, as where the captor can not with safety to himself spare a sufficient number of men to man the captured prize, or where the prize is too much injured to make an extended voyage, captured property may be disposed of before adjudication, or even destroyed, but a captor so acting without reasonable justification renders himself liable in respect of neutral property improperly dealt with, and will in all likelihood, on subsequent proceedings in a prize court, be heavily mulcted in damages and costs. Destruction was, however, freely and systematically resorted to by the United States cruisers in the war of 1812–1814 and by the Confederates in the civil war. And in any case it is in the formal revision of the legitimacy of the proceedings of the captor and not in the actual handling of the proceeds that consists

the real value of the prize tribunal. So a sentence of condemnation may, it has been held in British courts, be well passed by a competent prize court on property taken after capture into and still lying within a neutral port, although in general it is the clear duty of the captor to bring his prize for adjudication as speedily as possible to a port of his own country.

For a neutral vessel destroyed by a belligerent the neutral proprietor has a clear claim to full indemnity from the destroyer; for neutral property destroyed with a justifiably destroyed hostile vessel no claim can be admitted by the belligerent. (Manual of International Law, p. 152.)

If the statement in the first clause above means to imply that the grounds which would be a "reasonable justification" for the destruction of a belligerent vessel may be a "reasonable justification" for the destruction of a neutral vessel, it is not according to the present idea in regard to the treatment of neutrals.

Hall says that—

Some authorities appear to look upon the destruction of captured enemy's vessels as an exceptionally violent exercise of the extreme rights of war * * * It is somewhat difficult to see in what the harshness consists of destroying property which would not return to the original owner if the alternative process of condemnation by a prize court were suffered. It has passed from him to the captor, and if the latter chooses rather to destroy than to keep what belongs to himself, persons who have no proprietary interest in the objects destroyed have no right to complain of his behavior. Destruction of neutral vessels or of neutral property on board an enemy's vessel would be a wholly different matter. (International Law, 5th ed., p. 459.)

Hall summarizes the relations of the captor to the neutral prize as follows:

In the absence of proof that he has rendered himself liable to penalties, a neutral has the benefit of those presumptions in his favor which are afforded by his professed neutrality. His goods are prima facie free from liability to seizure and confiscation. If then they are seized it is for the captor, before confiscating them or inflicting a penalty of any kind on the neutral, to show that the acts of the latter have been such as to give him a right to do so. Property therefore in neutral goods or vessels which are seized by a belligerent does not vest upon the completion of a capture. It remains in the neutral until judgment of confiscation has been pronounced by the competent courts after due legal investigation. The courts before which the question is brought whether capture of neutral property has been

effected for sufficient cause are instituted by the belligerent and sit in his territory, but the law which they administer is international law.

Such being the position of neutral property previously to adjudication, and such being the conditions under which adjudication takes place, a captor lies under the following duties: * * *

He must bring in the captured property for adjudication, and must use all reasonable speed in doing so. In cases of improper delay, demurrage is given to the claimant, and costs and expenses are refused to the captor. It follows as of course from this rule—which itself is a necessary consequence of the fact that property in neutral ships and goods is not transferred by capture—that a neutral vessel must not be destroyed; and the principle that destruction involves compensation was laid down in the broadest manner by Lord Stowell; where a ship is neutral, he said, "the act of destruction can not be justified to the neutral owner by the gravest importance of such an act to the public service of the captor's own state; to the neutral it can only be justified under any circumstances by a full restitution in value." It is the English practice to give costs and damages as well; to destroy a neutral ship is a punishable wrong; if it can not be brought in for adjudication, it can and ought to be released. If a vessel is not in a condition to reach a port where adjudication can take place, but can safely be taken into a neutral port, it is permissible to carry her thither, and to keep her there if the local authorities consent. In such case the witnesses, with the ship's papers and the necessary affidavits, are sent in charge of an officer to the nearest port of the captor where a prize court exists. (International Law, 5th ed., p. 733.)

A late English opinion is as follows:

If the prize is a neutral ship, no circumstances will justify her destruction before condemnation. The only proper reparation to the neutral is to pay him the full value of the property destroyed. (Atlay's edition Wheaton's International Law, p. 507, sec. 359e.)

In an address before the British Academy, April 12, 1905 (Proceedings, Vol. III, p. 12), Professor Holland sets forth the present position in regard to the destruction of neutral vessels. He says:

If ship and cargo belong, beyond question, to the enemy, he may, after taking off the crew, sink the ship, the property in which is now vested in his own government.

If, however, the ship or cargo be neutral, the matter is not so simple. The neutral government is not bound to acquiesce in the destruction of the possibly innocent property of its subjects, at any rate unless some overwhelming necessity can be shown for the course which has been adopted; if, indeed, even overwhelming necessity would be sufficient to justify it.

The destruction of a neutral ship must be clearly distinguished from the destruction of a belligerent ship even under the principles at present generally accepted. If the belligerent's vessel is good prize it may be lost to that belligerent from the time when his opponent captures it. This is not always necessarily the case, because it may be recaptured or a court for some reason may not condemn the vessel. "Quarter-deck courts" should be avoided, except in extreme instances, even in deciding on the destruction of enemy vessels. Such vessels may have neutral cargo, which may be in no way involved in the hostilities. The principle of the Declaration of Paris that "neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag," may be involved in such manner as to make great caution necessary in destroying vessels of the enemy before adjudication.

Much greater care should be taken before destroying a neutral vessel itself.

Lawrence, writing in 1895, says:

> Meanwhile it is necessary to point out that a broad line of distinction must be drawn between the destruction of enemy property and the destruction of neutral property. The former has changed owners directly the capture is effected, and it matters little to the enemy subject who has lost it whether it goes to the bottom of the sea or is divided by public authority among those who have deprived him of it. But the latter does not belong to the captors till a properly constituted court has decided that their seizure of it was good in international law, and its owners have a right to insist that an adjudication upon their claim shall precede any further dealings with it. If this right of theirs is disregarded a claim for satisfaction and indemnity may be put in by their government. It is far better for a naval officer to release a ship or goods as to which he is doubtful, than to risk personal punishment and international complications by destroying innocent neutral property. Even where what is believed to be enemy property is concerned, and destruction or release becomes the only possible alternative, it would perhaps be wise to adopt the latter unless the hostile nationality of the vessel and ownership of the cargo are too clearly established to admit of mistake. But the necessity of rapid movement in modern naval warfare, combined with the fact that neutral ports will in most cases be closed to prizes, is almost certain to result in an increase of the practice of destruction unless the nations will consent to take a further step forward and prohibit the capture of private property unless it be contraband of war. (Principles of International Law, p. 406.)

Further it is generally admitted that the destruction of neutral property can only be justified to the neutral by full restitution of value. The naval officer destroying a neutral vessel would thus assume a serious responsibility in case the destruction is not justifiable. In case it is not warranted there would fall upon the belligerent destroying the neutral vessel not merely claim for full restitution of value, but also claim for damages.

The generally enunciated rule in regard to destruction of an enemy's vessel is, "an enemy's ship can be destroyed only after her crew has been placed in safety." If this is to be strictly interpreted, there would be considerable doubt as to whether the deck of a war vessel, whose commander fears that his prize is in imminent danger of recapture because of the approach of his enemy, would be a "place of safety." It is held that the property and persons of belligerents are subject to the hazard of war when coming within the field of operations. It would scarcely follow that such persons should be forced to assume such hazards, particularly when it is a matter of doubt before adjudication by the court whether the vessel is a proper subject for seizure. What is true of the belligerent vessel is even more emphatically true of a neutral vessel.

In regard to the destruction of prizes a telegram from the Department of State, Washington, August 6, 1904, says:

> Replying to Mr. Choate's telegram of the 3d instant, Mr. Hay states that, as the Department is not sufficiently advised of all the facts and circumstances connected with the sinking of the *Knight Commander*, it is not prepared to express an opinion on the case, nor can it say that, in case of imperative necessity, a prize may not be lawfully destroyed by a belligerent captor. (Foreign Relations, U. S., 1904, p. 337.)

In a communication of Lord Landsdowne to the British ambassador at St. Petersburg, August 10, 1904, a protest against the destruction of neutral ships is made:

> The position, already sufficiently threatening, is aggravated by the assertion on behalf of the Russian Government that the captor of a neutral ship is within his rights if he sinks it, merely for the reason that it is difficult, or impossible, for him to convey it to a national

port for adjudication by a Prize Court. We understand that this right of destroying a prize is claimed in a number of cases; among others, when the conveyance of the prize to a prize court is inconvenient because of the distance of the port to which the vessel should be brought, or when her conveyance to such a port would take too much time or entail too great a consumption of coal. It is, we understand, even asserted that such destruction is justifiable when the captor has not at his disposal a sufficient number of men from whom to provide a crew for the captured vessel. It is unnecessary to point out to Your Excellency the effects of a consistent application of these principles. They would justify the wholesale destruction of neutral ships taken by a vessel of war at a distance from her own base upon the ground that such prizes had not on board a sufficient amount of coal to carry them to a remote foreign port—an amount of coal with which such ships would probably in no circumstances have been supplied. They would similarly justify the destruction of every neutral ship taken by a belligerent vessel which started on her voyage with a crew sufficient for her own requirements only, and therefore unable to furnish prize crews for her captures. The adoption of such measures by the Russian Government could not fail to occasion a complete paralysis of all neutral commerce.

It appears to His Majesty's Government that no pains should be spared by the Russian Government in order to put an end without delay to a condition of things so detrimental to the commerce of this country, so contrary to acknowledged principles of international law and so intolerable to all neutrals. You should explain to the Russian Government that His Majesty's Government does not dispute the right of a belligerent to take adequate precautions for the purpose of preventing contraband of war, in the hitherto accepted sense of the words, from reaching the enemy; but they object to, and can not acquiesce in, the introduction of a new doctrine under which the well-understood distinction between conditional and unconditional contraband is altogether ignored, and under which, moreover, on the discovery of articles alleged to be contraband, the ship carrying them is, without trial and in spite of her neutrality, subjected to penalties which are reluctantly enforced even against an enemy's ship. (Parliamentary Papers, Russia, No. 1 (1905), p. 12.)

Many arguments may be urged against the destruction of neutral vessels. Before destruction in any case, the crew, passengers, and papers must be taken from the neutral vessel on board the belligerent ship. These are then immediately subject to all the dangers of war to which a war vessel of a belligerent is subject. Such a position may be an undue hardship for those who have not been engaged in the war and one to which they should not be exposed.

A belligerent vessel, with crew, passengers, and papers of the destroyed neutral vessel, may enter a neutral port to which entrance with the vessel itself would be forbidden. This is in effect almost an evasion of the general prohibition in regard to the entrance of prize, because on board the belligerent vessel is the evidence upon which the decision of the prize court of the belligerent will be rendered. It is certain that a neutral state would be very reluctant to admit within its territory a belligerent vessel having on board the crew and papers of one of its own private vessels which the belligerent had destroyed. The belligerent vessel might thus obtain the supplies from the neutral which would enable it to carry to its prize court the evidence in regard to capture.

It does not seem possible in view of precedent and practice to deny the right of a belligerent to destroy his enemy's vessel in case of necessity. Of course if the doctrine of exemption of private property at sea is generally adopted this right can no longer be sustained. The destruction of neutral vessels not involved in the service of the belligerent is sanctioned neither by precedent nor practice.

Conclusion.—Certainly the rules of the Institute of International Law adopted at Turin in 1882 are sufficiently liberal. These provide for the destruction of an enemy's vessel—

1. If unseaworthy;
2. If unable to accompany the fleet;
3. If there is danger from a superior force of the enemy;
4. If the captor can not without danger spare a prize crew, and
5. If the port to which the vessel should be conducted is too remote. (Annuaire 1883, p. 221.)

These rules apply to enemy vessels only, and not to neutral vessels. The attempts to justify the destruction of neutral vessels by reference to the above rules is in no way justified.

The rule contained in the United States instructions to blockading vessels and cruisers in 1898 (General Order

492) if restricted to enemy vessels would seem satisfactory provided the destruction of vessels is to be allowed at all. The rule thus restricted would read:

> If there are controlling reasons why enemy vessels may not be sent in for adjudication, as unseaworthiness, the existence of infectious disease, or the lack of a prize crew, they may be appraised and sold; and if this can not be done, they may be destroyed. The imminent danger of recapture would justify destruction, if there was no doubt that the vessel was good prize. But in all such cases all the papers and other testimony should be sent to the prize court in order that a decree may be duly entered.

If a seized neutral vessel can not for any reason be brought into port for adjudication it should be dismissed.

Topic V.

What position should be assumed in regard to the doctrine of continuous voyage?

CONCLUSION.

The actual destination of vessels or goods will determine their treatment on the seas outside of neutral jurisdiction.

DISCUSSION AND NOTES.

Development of doctrine of continuous voyage.[a]—It was a common practice of the eighteenth century to limit the carrying trade between mother country and the dependencies to domestic vessels. Many States still impose restrictions upon the coasting and domestic carrying trade. When in the war of 1756 France opened to the Dutch the trade with her colonies previously confined to her own vessels, the English maintained that the Dutch vessels thus engaged were practically in the commercial navy of France and liable to similar treatment. Dutch vessels were accordingly captured and condemned. There were, however, various treaties prior to 1756 by the provisions of which one of the parties to the treaty was to be permitted in time of war to trade at ports belonging to the enemy of the other party. This privilege was a matter of treaty provision between the United States and France in 1778. Article XXIII states:

> It shall be lawful for all and singular the subjects of the Most Christian King, and the citizens, people, and inhabitants of the said United States, to sail with their ships with all manner of liberty and security, no distinction being made who are the proprietors of the merchandises laden thereon, from any port to the places of those who now are or hereafter shall be at enmity with the Most Christian King or the United States. It shall likewise be lawful for the subjects and inhabitants aforesaid to sail with the ships and merchandises aforementioned,

[a] See also International Law Situations, 1901, Naval War College, pp. 41–84.

and to trade with the same liberty and security from the places, ports, and havens of those who are enemies of both or either party, without any opposition or disturbance whatsoever, not only directly from the places of the enemy aforementioned to neutral places, but also from one place belonging to an enemy to another place belonging to an enemy, whether they be under the jurisdiction of the same prince or under several. And it is hereby stipulated that free ships shall also give a freedom to goods, and that everything shall be deemed to be free and exempt which shall be found on board the ships belonging to the subjects of either of the confederates, although the whole lading or any part thereof should appertain to the enemies of either, contraband goods being always excepted. It is also agreed in like manner that the same liberty be extended to persons who are on board a free ship, with this effect, that although they be enemies to both or either party, they are not to be taken out of that free ship, unless they are soldiers and in actual service of the enemies.

This freedom of trade which had been a matter of treaty agreement was claimed by the armed neutrality of 1780 to be a general right. If trade is opened to all there can not be the same imputation of violation of neutrality as when in 1756 it was opened to a single State which accepting the opportunity, becomes a quasi-ally of the belligerent.

Apparently to avoid such difficulties as arose in the war of 1756, France opened the trade to the West Indian colonies permanently just before the war in 1779. The rule did not therefore receive much attention till revived in the war against France in 1793, when England attempted to prohibit practically all neutral trade with French colonies and in general the carriage of goods between French ports by neutrals.

Lord Stowell, referring to colonial trade in the case of the *Immanuel* (2 Robinson's Admiralty Reports, 197), gave a full statement of the relation of the neutral to trade with the enemy ports. He said:

Upon the outbreaking of a war it is the right of neutrals to carry on their accustomed trade, with an exception of the particular cases of a trade to blockaded places, or in contraband articles (in both which cases their property is liable to be condemned), and of their ships being liable to visitation and search; in which case, however, they are entitled to freight and expenses. I do not mean to say that in the accidents of a war the property of neutrals may not be variously entangled and endangered; in the nature of human connections it is

hardly possible that inconveniences of this kind should be altogether avoided. Some neutrals will be unjustly engaged in conveying the goods of the enemy, and others will be unjustly suspected of doing it. These inconveniences are more than fully balanced by the enlargement of their commerce; the trade of the belligerents is usually interrupted in a great degree, and falls in the same degree into the lap of neutrals. But without reference to accidents of the one kind or the other, the general rule is, that the neutral has a right to carry on, in time of war, his accustomed trade to the utmost extent of which that accustomed trade is capable. Very different is the case of a trade which the neutral has never possessed, which he holds by no title of use and habit in times of peace, and which, in fact, can obtain in war by no other title than by the success of one belligerent against the other, and at the expense of that very belligerent under whose success he sets up his title; and such I take to be the colonial trade, generally speaking.

In the same case, speaking further of colonies, he says:

Upon the interruption of a war, what are the rights of belligerents and neutrals, respectively, regarding such places? It is an indubitable right of the belligerent to possess himself of such places, as of any other possession of his enemy. This is his common right, but he has the certain means of carrying such a right into effect if he has a decided superiority at sea. Such colonies are dependent for their existence, as colonies, on foreign supplies; if they can not be supplied and defended, they must fall to the belligerent of course; and if the belligerent chooses to apply his means to such an object, what right has a third party, perfectly neutral, to step in and prevent the execution? No existing interest of his is affected by it; he can have no right to apply to his own use the beneficial consequences of the mere act of the belligerant; and to say, "True it is, you have, by force of arms, forced such places out of the exclusive possession of the enemy, but I will share the benefit of the conquest, and by sharing its benefits prevent its progress. You have in effect, and by lawful means, turned the enemy out of the possession which he had exclusively maintained against the whole world, and with whom we had never presumed to interfere, but we will interpose to prevent his absolute surrender by means of that very opening which the prevalence of your arms alone has effected, supplies shall be sent, and their products shall be exported; you have lawfully destroyed his monopoly, but you shall not be permitted to possess it yourself; we insist to share the fruits of your victories, and your blood and treasure have been expended, not for your own interest, but for the common benefit of others."

The British Order in Council issued June 8, 1793, and followed by others, aimed to restrict neutral commerce with the belligerent. It was conceded under interpreta-

tion of the Orders in Council that if goods were brought from the belligerent territory into a neutral country they might be free when transshipped.

Robinson (4 Admiralty Reports, Appendix) summarizes the course of the Orders in Council as affecting trade:

Soon after the commencement of the late war (November 6, 1793), the first set of instructions that issued were framed, not on the exception of the American war, but on the antecedent practice, and directed cruisers "to bring in, for lawful adjudication, all vessels laden with goods, the produce of any colony of France, or carrying provisions or supplies for the use of any such colony." The relaxations that have since been adopted have originated chiefly in the change that has taken place in the trade of that part of the world, since the establishment of an independent government on the continent of America. In consequence of that event, American vessels had been admitted to trade in some articles, and on certain conditions, with the colonies both of this country and France. Such a permission had become a part of the general commercial arrangement, as the ordinary state of their trade in time of peace. The commerce of America was therefore abridged by the foregoing instructions, and debarred of the right generally ascribed to neutral trade in time of war, that it may be continued, with particular exceptions, on the basis of its ordinary establishment. In consequence of representations made by the American Government to this effect, new instructions to our cruisers were issued on the 8th January, 1794, apparently designed to exempt American ships trading between their own country and the colonies of France. The directions were "to bring in all vessels laden with goods, the produce of the French West India Islands, and coming directly from any port of the said islands to any port in Europe."

In consequence of this relaxation of the general principle in favor of American vessels, a similar liberty of resorting to the colonial market for the supply of their own consumption was conceded to the neutral States of Europe. To this effect, a third set of public instructions was issued on the 25th January, 1798, which recited, as the special course of further alteration, the present state of the commerce of this country, as well as that of neutral countries, and directed cruisers "to bring in all vessels coming with cargoes, the produce of any island or settlement belonging to France, Spain, or Holland, and coming directly from any port of the said islands or settlements to any port of Europe, not being a port of this Kingdom, nor a port of the country to which such ships, being neutral ships, belonged."

Neutral vessels were, by this relaxation, allowed to carry on a direct commerce between the colony of the enemy and their own country; a concession rendered more reasonable by the events of war, which, by annihilating the trade of France, Spain, and Holland had entirely deprived the States of Europe of the opportunity of supplying them-

selves with the articles of colonial produce in those markets. This is the sum of the general rule, and of the relaxations, in the order in which they have occurred.

Many protests came from the United States against the position assumed by Great Britain. It was claimed that neutrals had the right "to trade, with the exception of blockades and contrabands, to and between all ports of the enemy, and in all articles, although the trade should not have been opened to them in time of peace."

Naturally the concessions in regard to importation of goods from the colony gave rise to questions as to what constituted an actual importation of the goods and a completed voyage.

In the case of the *William* there is a full discussion of what constitutes a completed, in distinction from an interrupted, voyage:

What, with reference to this subject, is to be considered a direct voyage from one place to another? Nobody has ever supposed that a mere deviation from the straightest and a shortest course in which the voyage could be performed would change its destination and make it cease to be a direct one within the intendment of the instructions. Nothing can depend on the degree or the direction of the deviation, whether it be of more or fewer leagues, whether toward the coast of Africa or toward that of America. Neither will it be contended that the point from which the commencement of a voyage is to be reckoned changes as often as the ship stops in the course of it. Nor will it the more change because a party may choose arbitrarily, by the ship's papers or otherwise, to give the name of a distinct voyage to each stage of a ship's progress. The act of shifting the cargo from the ship to the shore and from the shore back again to the ship does not necessarily amount to the termination of one voyage and the commencement of another. It may be wholly unconnected with any purpose of importation into the place where it is done. Supposing the landing to be merely for the purpose of airing or drying the goods, or of repairing the ship, would any man think of describing the voyage as beginning at the place where it happened to become necessary to go through such a process? Again, let it be supposed that the party has a motive for desiring to make the voyage appear to begin at some other place than that of the original lading, and that he therefore lands the cargo purely and solely for the purpose of enabling himself to affirm that it was at such other place that the goods were taken on board, would this contrivance at all alter the truth of the fact? Would not the real voyage still be from the place of the original shipment, notwithstanding the attempt to give it the appearance of

having begun from a different place? The truth may not always be discernible, but when it is discovered it is according to the truth and not according to the fiction that we are to give to the transaction its character and denomination. If the voyage from the place of lading be not really ended, it matters not by what acts the party may have evinced his desire of making it appear to have ended. That those acts have been attended with trouble and expense, can not alter their quality or their effect. The trouble and expense may weigh as circumstances of evidence to show the purpose for which the acts were done, but if the evasive purpose be admitted or proved, we can never be bound to accept, as a substitute for the observance of the law, the means, however operose, which have been employed to cover a breach of it. Between the actual importation by which a voyage is really ended, and the colorable importation which is to give it the appearance of being ended, there must necessarily be a great resemblance. The acts to be done must be almost entirely the same; but there is this difference between them, the landing of the cargo, the entry at the custom-house, and the payment of such duties as the law of the place requires, are necessary ingredients in a genuine importation; the true purpose of the owner can not be effected without them. But in a fictitious importation, they are mere voluntary ceremonies which have no natural connection whatever with the purpose of sending on the cargo to another market, and which, therefore, would never be resorted to by a person entertaining that purpose, except with a view of giving to the voyage, which he has resolved to continue, the appearance of being broken by an importation which he has resolved not really to make." (5 Robinson's Admiralty Reports, 387.)

Extension of the doctrine of continuous voyage.—The doctrine of continuous voyages as originally enunciated was intended to apply to comparatively slow-moving sailing vessels. The aim of the rule was to prevent the giving of aid to a belligerent by a neutral. It is undoubtedly proper for one belligerent to take measures which will prevent a neutral from aiding his opponent in his warlike undertaking. Therefore, it is generally held that he may capture and confiscate contraband having a belligerent destination or seize vessel and goods bound for a blockaded port. The question of destination becomes one of great importance. It is undeniable that neutral commerce in goods of whatever kind if *bona fide* commerce between neutral ports can not be interrupted.

The destination of the vessel is usually evident from the ship's papers and should always be thus shown. If the port of ultimate destination and all intermediate ports of

call are neutral, there can be no question that the destination is neutral. If any port, an intermediate or ultimate port, is belligerent, the destination is considered belligerent.

As a general rule the destination of the cargo is held to follow the destination of the vessel. This might be said to be almost the sole rule for determining the destination of cargo before the American civil war. At that time new positions began to be taken. These positions referred back to English practice in the war with France for support. The doctrine now separates vessel and cargo and considers that a vessel may have a neutral destination, while the cargo may have a belligerent destination or that the cargo may be bound for a blockaded port while the vessel upon which it is for the time being has a neutral destination.

During the American civil war the Supreme Court, referring to the precedents in the opinions of Lord Stowell, gave new interpretations to the principles and a decided extension to the doctrine of continuous voyage. While Lord Stowell had applied the doctrine to vessels of one of the belligerents carrying on forbidden trade with the enemy, the United States courts extended the doctrine to neutral vessels and cargo sailing from neutral ports with intent to violate blockade even if a neutral port should be the immediate point toward which the vessel was bound with the intent of there interrupting the voyage. Under the ordinary rules of war the vessel and cargo would be liable to capture when bound directly for the blockaded port. The new interpretation extended the liability to the voyage between the port of departure and the port of call provided the intent could be proven in regard to the earlier stage of the voyage.

The law in regard to blockade runners shows effect of intent:

> A vessel of this class is engaged *ab initio* in illegal traffic. From the hour she sails to the hour she returns to her home port she is taking part in existing war—she is assisting or endeavoring to assist one of the belligerents and to thwart the military plans and purposes of the other. It is not necessary that she be taken in the act of breaking the blockade to be *in delicto*—she is *in delicto* from first to last. Fig-

uratively speaking she has hauled down the neutral flag and run up the flag of the belligerents in whose behalf she is acting. Such a vessel is treated substantially as if she had actually changed her flag for the whole voyage. She is liable to capture and condemnation, not only on the outward voyage but on the return voyage, nothwithstanding that her homeward bound cargo may be, and ordinarily is, innocent merchandise. Having sailed in the service of a belligerent power she is supposed to continue in that service until she makes her own port. After she has made her home port she is at liberty to resume her neutral flag, and when sailing under it her previous conduct is not open to inquiry. (The *Galen*, 37 U. S. Court of Claims, 89, Nott, C. J., Dec. 9, 1901.)

The French prize court in the case of the *Frau-Hounina* in 1855 affirmed that—

Contraband of war is liable to seizure under a neutral flag, when it belongs to the enemy, or when it is destined to the territory, the army or fleet of the enemy.

In the case of the *Circassian* decided in 1864 (2 Wallace, Supreme Court Reports, 135), Chief Justice Chase affirmed that—

It is a well-established principle of prize law, as administered by the courts, both of the United States and Great Britain, that sailing from a neutral port with intent to enter a blockaded port, and with knowledge of the existence of the blockade, subjects the vessel, and, in most cases, its cargo, to capture and condemnation. *Yeaton* v. *Fry*, 5 Cranch, 335; 1 Kent Com., 150; *The Frederick Molke*, 1 C. Rob., 72; *The Columbia*, 1 C. Rob., 154; *The Neptunus*, 2 C. Rob., 94. We are entirely satisfied with this rule. It was established, with some hesitation, when sailing vessels were the only vehicles of ocean commerce; but now, when steam and electricity have made all nations neighbors, and blockade running from neutral ports seems to have been organized as a business, and almost raised to a profession, it is clearly seen to be indispensable to the efficient exercise of belligerent rights. It is not likely to be abandoned until the nations, by treaty, shall consent to abolish capture of private property on the seas, and with it the whole law and practice of commercial blockade.

And further the decision states:

We agree that if the ship had been going to Havana with an honest intent to ascertain whether the blockade at New Orleans yet remained in force, and with no design to proceed farther if such should prove to be the case, neither ship nor cargo would have been subject to lawful seizure. But it is manifest that such was not the intent. The existence of the blockade was known at the inception of the voyage and its discontinuance was not expected. The vessel was

chartered and her cargo shipped with the purpose of forcing the blockade. The destination to Havana was merely colorable. It proves nothing beyond a mere purpose to touch at that port, perhaps and probably, with the expectation of getting information which would facilitate the success of the unlawful undertaking. It is quite possible that Havana, under the circumstances, would have turned out to be, as was insisted in argument, a *locus penitentiæ*, but a place for repentance does not prove repentance before the place was reached. It is quite possible that the news which would have met the vessel at Havana would have induced the master and shippers to abandon their design to force the blockade by ascending the Mississippi, but future possibilities can not change present conditions. Nor is it at all certain that the purpose to break the blockade would have been abandoned. On the contrary, it is quite possible that the "ulterior destination" mentioned in the bills of lading would have been changed to some other blockaded port. But this is not important. Neither possibilities nor probabilities could change the actual intention one way or another. At the time of capture ship and cargo were on their way to New Orleans, under contract that the cargo should be discharged there and not elsewhere, and that the blockade should be forced in order to the fulfillment of that contract. This condition made ship and cargo then and there lawful prize.

In the same case the court also held that—

A vessel sailing from a neutral port with intent to violate a blockade is liable to capture and condemnation as a prize from the time of sailing, though she intend to call at another neutral port, not reached at time of capture, before proceeding to her ulterior destination.

The position here taken makes the vessel liable for intent of the voyage.

It may happen, however, that a neutral vessel is making a voyage between two neutral ports only, but that the cargo has a belligerent destination to which it is to be taken by another vessel. Could the doctrine of continuous voyages be extended to apply to ship and cargo in the first stage of the voyage between the neutral ports?

The doctrine of continuous voyage was further extended to cover such instances in the case of the *Bermuda* (3 Wallace U. S. Supreme Court Reports, p. 514) in 1865, in which Chief Justice Chase said:

The interposition of a neutral port between neutral departure and belligerent destination has always been a favorite resort of contraband carrriers and blockade runners. But it never avails them when the ultimate destination is ascertained. A transportation from one point

to another remains continuous so long as intent remains unchanged, no matter what stoppages or transshipments intervene.

This was distinctly declared by this court in 1855 in Jecker *v.* Montgomery (18 How., 114), in reference to American shipments to Mexican ports during the war of this country with Mexico, as follows: "Attempts have been made to evade the rule of public law by the interposition of a neutral port between the shipment from the belligerent port and the ultimate destination in the enemy's country, but in all such cases the goods have been condemned as having been taken in a course of commerce rendering them liable to confiscation."

The same principle is equally applicable to the conveyance of contraband to belligerents and the vessel which with the consent of the owner is so employed in the first stage of a continuous transportation is equally liable to capture and confiscation with the vessel which is employed in the last if the employment is such as to make either so liable.

This rule of continuity is well established in respect to cargo.

At first, Sir William Scott held that the landing and warehousing of the goods and the payment of the duties on importation was a sufficient test of the termination of the original voyage, and that the subsequent exportation of them to a belligerent port was lawful. But in a later case, in an elaborate judgment, Sir William Grant reviewed all the cases, and established the rule, which has never been shaken, that even the landing of goods and payment of duties does not interrupt the continuity of the voyage of the cargo, unless there be an honest intention to bring them into the common stock of the country. If there be an intention, either formed at the time of original shipment or afterwards, to send the goods forward to an unlawful destination, the continuity of the voyage will not be broken, as to the cargo, by any transactions at the intermediate port.

There seems to be no reason why this reasonable and settled doctrine should not be applied to each ship where several are engaged successively in one transaction, namely, the conveyance of a contraband cargo to a belligerent. The question of liability must depend on the good or bad faith of the owners of the ships. If a port of the voyage is lawful, and the owners of the ship conveying the cargo in that port are ignorant of the ulterior destination and do not hire their ship with a view to it, the ship can not be liable; but if the ulterior destination is the known inducement to the partial voyage and the ship is engaged in the latter with a view to the former, then whatever liability may attach to the final voyage must attach to the earlier, undertaken with the same cargo and in continuity of its conveyance. Successive voyages, connected by a common plan and a common object, form a plural unit. They are links of the same chain, each identical in description with every other, and each essential to the continuous whole. The ships are planks of the same bridge, all of the same kind, and all necessary to the convenient passage of persons and property from one end to the other.

In affirming the decision of the district court in the case of the *Stephen Hart* in 1865 (3 Wallace, Supreme Court Reports, p. 559) Chief Justice Chase said:

> Neutrals who place their vessels under belligerent control, and engage them in belligerent trade, or permit them to be sent with contraband cargoes under cover of false destination to neutral ports, while the real destination is to belligerent ports, impress upon them the character of the belligerent in whose service they are employed, and can not complain if they are seized and condemned as enemy property.

The case of the *Springbok*, decided in the United States Supreme Court in 1866, also gave full extension to the doctrine of continuous voyage. This vessel sailed from London December 8, 1862, on a voyage ostensibly for Nassau. The vessel was captured before reaching that port and brought into New York where she was libeled as prize. The district court condemned the vessel and cargo as prize of war. The case was appealed to the Supreme Court, which reversed the decree as to the vessel and affirmed the decree as to the cargo.

The summary of the case shows that when goods destined for a belligerent are in transit between neutral ports in a neutral ship the ship is liable to seizure in order to secure the condemnation of the goods, but itself may not be condemned as prize.

In regard to the cargo, Mr. Chief Justice Chase gave the opinion of the court that—

> Upon the whole case we can not doubt that the cargo was originally shipped with the intent to violate the blockade; that the owners of the cargo intended that it should be transshipped at Nassau into some vessel more likely to succeed in reaching a blockaded port than the *Springbok;* that the voyage from London to the blockaded port was, as to the cargo, both in law and in intent of the parties, one voyage; and that the liability to condemnation, if captured during any part of the voyage, attached to the cargo from the time of sailing. (5 Wallace, 1.)

Travers Twiss, commenting on these cases in 1877, says:

> In the case of the *Springbok* and her cargo the court released the ship and condemned the cargo. It released the ship, being satisfied that it was going no farther than to Nassau, a neutral port. It condemned the cargo, having no doubt that it was the intention of the

owners to tranship it at Nassau to some blockaded port. The judgment of the court was thus expressed: "On the whole, we can not doubt that the cargo was originally shipped with intent to violate the blockade; that the owners of the cargo intended that it should be transhipped at Nassau into some vessel more likely to succeed in reaching safely a blockaded port than the *Springbok;* that the voyage from London to the blockaded port was, as to cargo, both in law and in the intent of the parties, one voyage, and the liability of condemnation, if captured during any part of the voyage, attached to the cargo from the time of sailing." The Chief Justice had already illustrated the principle in the case of the *Bermuda* by a somewhat fanciful metaphor. "Successive voyages connected by a common plan and a common object form a plural unit. They are links of the same chain, each identical in description with every other and each essential to the continuous whole." Unfortunately, however, as regards the application of the metaphor to the case of the cargo of the *Springbok*, the last link, which was essential to complete the chain, was wanting, as a matter of fact, whilst in the English cases, from which the metaphor has been borrowed, the chain was in fact complete. (The Doctrine of Continuous Voyages, Law Magazine and Review, Nov., 1877, p. 24.)

Travers Twiss also protested against the extension of the idea of blockade through an attempt to introduce it as a factor in continuous voyage, as in the case of the *Springbok*. He said:

Whatever may be the correct interpretation of the Fourth Article of the Declaration of Paris, and whatever effect may be practically given to it by the powers who are parties to it, one thing may be affirmed for certain, that it was the intention of those who drew up that Declaration to *mitigate* and not to *aggravate* the restraint imposed upon the commerce of Neutrals by the blockade of an enemy's ports. Great Britain and the United States of America had until then been content to enforce against neutral merchants the confiscation of their property upon proof of some constructive attempt upon their part to violate blockade; it has remained for the younger sister, under her extraordinary difficulties, to initiate the doctrine of *prospective intention*, on the part of a neutral merchant, to violate blockade, and to subject him to the confiscation of his property, not upon the *evidence* of any present voyage of the ship and cargo, in which the ship and cargo have been intercepted, but upon the *presumption* of a future voyage of the cargo alone to a blockaded port, after it has been landed from the ship at a neutral port." He also contends against confiscation "upon the *suspicion*" that the cargo has an ulterior destination to enemy's uses. (Law Magazine and Review, Nov. 1877, p. 34.)

Speaking of the decision in the case of the *Springbok*, Walker says:

This decision, it is very evident, materially extends the risks of the neutral trader in the interests of the belligerent, and it has accordingly been the subject of severe and not unmerited adverse criticism at the hands of supporters of the freedom of neutral commerce. (Science of International Law, 1893, p. 516.)

Sir Robert Phillimore says:

It seems to me after much consideration, and with all respect for the high character of the tribunal, difficult to support the decision of the majority of the Supreme Court of the United States in the case of the *Springbok*, that a cargo shipped for a neutral port can be condemned on the ground that it was intended to tranship it at that port and forward it by another vessel to a blockaded port. (International Law, CCXCVIII.)

Hall also takes positive grounds in opposition to the doctrine of continuous voyage, as enunciated by the United States courts. He says:

By the American courts this idea of continuous voyage was seized upon and applied to cases of contraband and blockade. Vessels were captured while on their voyage from one neutral port to another and were then condemned as carriers of contraband or for intent to break blockade. They were thus condemned not for an act—for the act done was in itself innocent, and no previous act existed with which it could be connected so as to form a noxious whole—but on mere suspicion of intention to do an act. Between the grounds upon which these and the English cases were decided there was of course no analogy. The American decisions have been universally reprobated outside the United States, and would probably now find no defenders in their own country. (International Law, 5th ed., p. 669.)

Mr. Atlay, editing this edition of Hall's work, thinks "that the destination of the cargo, not merely the destination of the vessel, will be the criterion" (Note, p. 672), would be the position which would be sustained by the British Government.

The case of the *Springbok* (1866) has been discussed most widely and seriously. The jurists on the Continent were uniformly opposed to the principles supposed to be enunciated in the decision. A formal statement was issued by some of the leading authorities on international law in 1882. The French text appears in the Revue de Droit In-

ternational et de Legislation Comparée (Tome xiv, 1882, p. 329), and a translation is given in Wharton's International Law Digest (Vol. III, sec. 362, p. 401) as follows:

Opinion delivered by Professor Arntz, professor of international law in the University of Brussels and advocate; Asser, professor of international law in the University of Amsterdam and legal councilor of the department of foreign affairs at The Hague, advocate, etc.; Bulmerincq, privy councilor, professor of international law in the University of Heidelberg, etc.; Gessner, doctor of civil law, acting imperial councilor of legation at Berlin; William Edward Hall, doctor of laws of the University of Oxford; De Martens, professor of international law in the University of St. Petersburg and councilor at the minister of foreign affairs there, etc.; Pierantoni, professor of international law in the University of Rome and member of the council of diplomatic controversy, etc.; Renault, professor of international law in the Faculty of Law and in the Free School of Political Science at Paris; Alberic Rollin, professor of law in the University of Ghent and advocate, and Sir Travers Twiss, Q. C., formerly professor of international law in London and of civil law in Oxford, late Queen's advocate-general, etc.

"We, the undersigned members of the maritime prize commission, nominated by the Institute of International Law from amongst its members to frame a scheme of international maritime prize law, having been consulted as to the juridical soundness of the doctrine laid down and applied by the Supreme Court of the United States of America in the case of the *Springbok*, have unanimously given the following opinion:

"That the theory of continuous voyages, as we find it enunciated and applied in the judgment of the Supreme Court of the United States of America, which condemned as good prize of war the entire cargo of the British bark *Springbok* (1867), a neutral vessel on its way to a neutral port, is subversive of an established rule of the law of maritime warfare, according to which neutral property on board a vessel under a neutral flag, whilst on its way to another neutral port, is not liable to capture or confiscation by a belligerent as lawful prize of war; that such trade when carried on between neutral ports has, according to the law of nations, ever been held to be absolutely free, and that the novel theory, as before propounded, whereby it is presumed that the cargo, after having been unladen in a neutral port, will have an ulterior destination to some enemy port, would aggravate the hindrances to which the trade of neutrals is already exposed, and would, to use the words of Bluntschli, 'annihilate' such trade, by subjecting their property to confiscation, not upon proof of an actual voyage of the vessel and cargo to an enemy port, but upon suspicion that the cargo, after having been unladen at the neutral port to which the vessel is bound, may be transshipped into some other vessel and carried to some effectively blockaded enemy port.

"That theory above propounded tends to contravene the efforts of the European powers to establish a uniform doctrine respecting the immunity from capture of all property under a neutral flag, contraband of war alone excepted.

"That the theory in question must be regarded as a serious inroad upon the rights of neutral nations, inasmuch as the fact of the destination of a neutral vessel to a neutral port would no longer suffice of itself to prevent the capture of goods noncontraband on board.

"That, furthermore, the result would be that, as regards blockade, every neutral port to which a neutral vessel might be carrying a neutral cargo would become constructively a blockaded port if there were the slightest ground for suspecting that the cargo, after being unladen in such neutral port was intended to be forwarded in some other vessel to some port actually blockaded.

"We, the undersigned, are accordingly of opinion that it is extremely desirable that the Government of the United States of America, which has been on several occasions the zealous promoter of important amendments of the rules of maritime warfare, in the interests of neutrals, should take an early opportunity of declaring, in such form as it may see fit, that it does not intend to incorporate the above-propounded theory into its system of maritime prize law, and that the condemnation of the cargo of the *Springbok* shall not be adopted as a precedent by its prize courts."

The *Dolphin*, ostensibly prosecuting a voyage from Liverpool to Nassau during the American civil war, was captured off Porto Rico. A claim to the vessel and cargo was made by the British owners on the ground that there was no intention to violate any neutral obligations. The court held that—

If we suppose the vessel and cargo to be owned as claimed, and that there was no intention on the part of the owner that the vessel should proceed with the cargo to a port of the enemy, then there would be no ground whatever to justify the capture or condemnation of either of them. Subject to the right of belligerent cruisers to visit and search merchant vessels, to ascertain their neutral or hostile characters and the character of their cargoes, and the legality of their voyages, neutrals possess an undisputed right to trade and carry on commerce among themselves in any kinds of merchandise they please, whether of the nature of contraband of war or not. Indeed, there can be no such thing as articles contraband of war in a strictly neutral trade. But if, on the other hand, it was the intention of the owner that the vessel should simply touch at Nassau, and should proceed thence to Charleston or some other port of the enemy, then the voyage was not a voyage prosecuted by a neutral from one neutral port to another, but was a voyage to a port of the enemy, begun and carried on in violation of the belligerent rights of the United States to blockade the

enemy's ports and prevent the introduction of munitions of war. The act of sailing for a blockaded port, with the knowledge of the existence of the blockade and with an intent to enter, is itself an attempt to break it, which subjects the vessel and cargo to capture in any part of its voyage. The *Columbia*, 1 C. Rob. Adm., 154; The *Neptunus*, 2 C., Rob. Adm., 110. So, also, the offense of attempting to carry articles contraband of war to the enemy is complete and the vessel liable to capture the moment she enters upon her voyage. The *Imina*, 3 C., Rob. Adm., 167. The offense consists in the act of sailing, coupled with the illegal intent. The cutting up of a continuous voyage into several parts, by the intervention or proposed intervention of several intermediate ports, may render it the more difficult for cruisers and prize courts to determine where the ultimate terminus is intended to be; but it can not make a voyage which in its nature is one, to become two or more voyages, nor make any of the parts of one entire voyage to become legal which would be illegal if not so divided. When the truth is discovered, it is according to the truth and not according to the fiction, that the question is to be determined. The *Maria*, 5 C., Rob. Adm., 365; The *Wm.*, id., 385; The *Richmond*, id., 325; The *Thomyris*, Edw. Adm., 17.

It is argued that it was lawful for the vessel to go to Nassau, notwithstanding the existence of an intention that she should proceed thence to Charleston, for the reason that, until after she had entered on the last stage of her voyage, the whole matter rested in possibility merely—in intention only, and not in act—and that the intention to commit an offense *in futuro* is not tantamount in law to its actual commission *in præsenti*. But this argument begs the whole question. It was not lawful for the vessel to go to Nassau, with an intention of continuing the voyage thence to Charleston in a direct course, without going to Nassau at all. The fallacy consists in supposing that there is something in the intention to stop at a neutral port, which, in itself, is innocent enough, that will extinguish the illegality of an additional guilty intention to proceed on, beyond such a port, to a blockaded port, and thus legitimatize the first stage of the voyage. But the voyage is one, from the port of lading to the port of delivery, and, if unlawful in any part, is unlawful throughout.

It is also argued that a *locus penitentione* existed until the vessel had departed from Nassau on her voyage to a blockaded port, and that the voyage might be ended there, or changed to a lawful port. But this argument will apply with equal force to a voyage in which no intermediate port is intended to be interposed. The owner or master may in any case, in port or in the middle of the ocean, abandon the illegal purpose and change the voyage. If this be done voluntarily, before capture, the original offense is extinguished, and the vessel will be restored; but if the illegal purpose exists at the time of capture, the vessel is taken *in delicto*, whether the voyage is prosecuted in a direct course or circuitously. If the illegal purpose is shown to exist at the inception of the voyage, it will be presumed to exist up to the time of

capture, unless it is satisfactorily shown that the purpose had been abandoned and the voyage changed. (The *Dolphin*, Federal Cases, No. 3975.)

Of the above decision the solicitor of England (Sir Roundell Palmer) said in the House of Commons, June 29, 1863:

If the owners imagine that the mere fact of the vessel touching at Nassau when on such an expedition exonerated her, they were very much mistaken.

Later the principle applied in the case of the *Dolphin* was cited and made in some respects more definite in the case of the *Pearl*. The judge said:

I have already decided, in the case of the *Dolphin* (Case No. 3975), that a vessel bound on a voyage from Liverpool to Nassau, with an intention of touching only at the latter port and of proceeding thence to a blockaded port of the enemy, is engaged in an attempt to violate the blockade, which subjects her to capture in the antecedent as well as in the ultimate stage of the voyage—before arriving at Nassau as well as after having left that port. I think the law also is that if an owner sends his vessel to a neutral port with a settled intention to commence from such a port a series of voyages to a blockaded port he thereby commences to violate the blockade, and subjects his vessel to capture, notwithstanding he may also intend to unlade the vessel at the neutral port, discharge the crew, and give all other external manifestations of an intention to end the voyage at such port. Where a deliberate purpose exists to violate a blockade, and measures are actually taken to accomplish that object, the law couples the act and the intent together and declares the offense to be complete. The resorting, therefore, to a neutral port for the purpose of the better disguising the intention, or of procuring a pilot for the blockaded port, or of perfecting the arrangements so as to increase the chances of successful violation of the blockade, will not in the least extenuate the offense or avoid the penalty. These measures may increase the difficulty of discovering the true intention, but whenever it is discovered it will give to the transaction its true legal character. (Federal Cases, No. 10874.)

Importance of destination of vessel.—Dana in his note (231) to Wheaton's International Law says:

The examination into the continuous nature of voyages is or may be necessary in reference alike to blockade, trade with enemies, unneutral service, and carrying contraband, and indeed to all cases where the destination of the vessel or cargo is material. The right of the belligerent is to know the facts. The policy of the neutral is to conceal

them. If the destination is really to a hostile port—if that is the plan or scheme of the voyage—it is, of course, immaterial what formal acts intended to deceive are interposed (p. 667, sec. 508).

The Turkish declaration of May 12, 1877, contains the following:

3. Afin d'empêcher la contrebande de guerre, le Gouvernement Ottoman usera du droit de visite tant en haute mer que dans les eaux Ottomans et lors du passage par les Détroits des navires neutres en destination d'un port Russe ou d'un point de la côte occupé par l'ennemi, ou même, en cas de suspicion, en destination d'un port Ottoman ou neutre.

The subject of destination is quite fully treated in articles of the British Admiralty Manual of Naval Prize Law (Holland's edition, 1888), issued by authority of the Lords Commissioners of the Admiralty of Great Britain:

DESTINATION OF THE VESSEL.

67. If any of the Goods are fit for purposes either of War exclusively or of War as well as of Peace, the Commander of the Cruiser should proceed to ascertain the destination of the Vessel. This should be done by inspection of her Charter party, her Log book, and other documents, and by inquiries from her Master and Crew.

68. A Vessel's destination should be considered Neutral if both the port to which she is bound and every intermediate port at which she is to call in the course of her voyage be Neutral, and if in no part of her Voyage she is to go to the Enemy's Fleet at Sea.

69. A Vessel's destination should be considered Hostile if either the port to which she is bound, or any intermediate port at which she is to call in the course of her voyage, be Hostile, or if in any part of her Voyage she is to go to the Enemy's Fleet at Sea.

70. It frequently happens that a Vessel's destination is expressed in her papers to be dependent upon contingencies. In such case the destination should be presumed Hostile if any one of the ports which under any of the contingencies she may be intended to touch at or go to be Hostile; but this presumption may be rebutted by clear proof that the Master has definitively abandoned a Hostile destination and is pursuing a Neutral one.

71. The ostensible destination of the Vessel is sometimes a Neutral port, while she is in reality intended, after touching and even landing and colorably delivering over her cargo there, to proceed with the same cargo to an Enemy port. In such a case the voyage is held to be "Continuous," and the destination is held to be Hostile throughout.

72. The destination of the Vessel is conclusive as to the destination of the Goods on board. If, therefore, the destination of the Vessel be Hostile, then the destination of the Goods on board should be consid-

ered Hostile also, notwithstanding it may appear from the Papers or otherwise that the Goods themselves are not intended for the Hostile port, but are intended either to be forwarded beyond it to an ulterior neutral destination, or to be deposited at an intermediate Neutral port.

73. On the other hand, if the destination of the Vessel be Neutral, then the destination of the Goods on board should be considered Neutral, notwithstanding it may appear from the Papers or otherwise that the Goods themselves have an ulterior Hostile destination, to be attained by transshipment, overland conveyance, or otherwise.

Question of destination of cargo in South African war.—The British rules seem logical and it was expected that this manual expressed the British point of view. The attitude of Great Britain was, however, tested in the South African war in December, 1899. The States with which Great Britain found herself at war were inland States with no seaports. The port through which supplies could be most easily forwarded to the South African belligerents was the neutral Portuguese port of Lourenço Marquez on Delagoa Bay. This port was connected by rail with the South African Republic. Great Britain maintained the right to visit and search vessels.

During the South African war, in December, 1899, and January, 1900, three German vessels were seized by the the British war vessels. These vessels were the *Herzog*, the *General*, and the *Bundesrath*. They were seized on suspicion of carrying contraband and enemy persons to the South African Republic. Of this action Germany took cognizance.

The German Government, on learning of the seizure of the *Bundesrath*, immediately protested and the German ambassador stated to the Marquis of Salisbury:

> That the Imperial Government, after carefully examining the matter and considering the judicial aspects of the case, are of the opinion that proceedings before a Prize Court are not justified.
>
> This view is grounded on the consideration that proceedings before a Prize Court are only justified in cases where the presence of contraband of war is proved, and that, whatever may have been on board the *Bundesrath*, there could have been no contraband of war, since, according to the recognized principles of international law, there can not be contraband of war in trade between neutral ports.

He also supported his opinion by reference to the British Admiralty Manual of Naval Prize Law which declared

that "a vessel's destination should be considered neutral, if both the port to which she is bound and every intermediate port at which she is to call in the course of her voyage be neutral," and "the destination of the vessel is conclusive as to the destination of the goods on board."

Lord Salisbury replied that the Admiralty Manual stated "in a convenient form the general principles by which Her Majesty's officers are guided in the exercise of their duties" and

That it does not treat of questions which will ultimately have to be disposed of by the Prize Court. * * * In the opinion of Her Majesty's Government the passage cited from the manual "that the destination of the vessel is conclusive as to the destination of the goods on board," has no application to such circumstances as had now arisen.

It can not apply to contraband of war on board of a neutral vessel if such contraband was at the time of seizure consigned or intended to be delivered to an agent of the enemy at a neutral port, or, in fact, destined for the enemy's country.

The true view in regard to the latter category of goods is, as Her Majesty's Government believe, correctly stated in paragraph 813 of Professor Bluntschli's "Droit International Codifié" (French translation of 1874, second edition of the work of this eminent German jurist): "Si les navires ou marchandises ne sont expédiés à destination d'un port neutre que pour mieux venir en aide à l'ennemi, il y aura contrebande de guerre et la confiscation sera justifiée."

Her Majesty's Government are unable, therefore, to agree that there are grounds for ordering the release of the *Bundesrath* without examination by the Prize Court as to whether she was carrying contraband of war belonging to or destined for the South African Republics. But they fully recognize how desirable it is that this examination should be carried through at the earliest possible moment, and that all proper consideration should be shown for the owners and for innocent passengers and merchandise on board of her. Repeated and urgent instructions have been sent by telegraph for this purpose, and arrangements have been made for the speedy transmission of the mails. (Parliamentary Papers, Africa, No. 1, (1900)).

The British Government was placed in an uncomfortable position; no contraband was found.

As we have seen, the examination proved futile, the compensation was duly paid, and the incident closed. It is unlikely that the exact circumstances of the *Bundesrath* and her consorts will ever be repeated or that we shall find ourselves at war with a civilized power possessing no seaboard. But should we in the future become involved in hostilities with a maritime power it is certain that the interpretation of the questions grouped generally under the term of "continuous

voyage" will assume grave importance. And I venture to think that the attitude of whatever British Government may be in office will tend rather to the views expressed by Lord Salisbury than to those enunciated by Mr. Hall, and that the destination of the cargo, not merely the destination of the vessel, will be the criterion. (Atlay's note to Hall's International Law, 5th ed., p. 671.)

Count von Bülow, in the German Reichstag, on January 19, 1900, discussing the seizure of certain German steamers by British war vessels, said:

I should like to lay down the following propositions, drawn up in conjunction with other competent departments, as a system of law which shall be operative in practice, and a disregard for which would, in our opinion, constitute a breach of international treaties and customs:

1. Neutral merchant ships on the high seas or in the territorial waters of the belligerent Powers (apart from the right of convoy, which does not arise in the case in point) are subject to the right of visit by the war ships of the belligerent parties. This undoubtedly applies to waters which are not too remote from the seat of war. No special agreement exists at present as regards mail steamers.

2. The right of visit is to be exercised with as much consideration as possible and without undue molestation.

3. The procedure in visiting a vessel consists of two or three acts, according to the circumstances of each case—stopping the ship, examining her papers, and searching her. The first two acts may be undertaken at any time and without other preliminary proceeding. If the neutral vessel resists the order to stop, or if irregularities are discovered in her papers, or if the presence of contraband is revealed, then the belligerent vessel may capture the neutral in order that the case may be investigated and decided upon by a competent prize Court.

4. By the term "contraband of war" only such articles or persons are to be understood as are suited for war and at the same time are destined for one of the belligerents. The class of articles to be included in this definition is a matter of dispute, and, with the exception of arms and ammunition, is determined, as a rule, with reference to the special circumstances of each case, unless one of the belligerents has expressly notified to the neutrals, in a regular manner, what articles it intends to treat as contraband, and has met with no opposition.

5. Discovered contraband is liable to confiscation, whether with or without compensation depends on the circumstances of each case.

6. If the seizure of the vessel was not justified, the belligerent State is bound to order the immediate release of ship and cargo, and to pay full compensation.

According to the above, and in view of the present practice of nations,

it would not have been possible to lodge a protest against the stopping on the high seas of the three steamers of the East African Line, or against the examination of their papers. On the other hand, by the same standard, the seizure and conveying to Durban of the *Bundesrath* and *Herzog* and the discharging of the cargoes of the *Bundesrath* and the *General* were undertaken upon insufficiently founded suspicion, and do not appear to have been justified.

I should wish to take this opportunity for observing that we strove from the outset to induce the English Government, in dealing with neutral vessels consigned to Delagoa Bay, to adhere to that theory of international law which guarantees the greatest security to commerce and industry and which finds expression in the principle that for ships consigned from neutral States to a neutral port the notion of contraband of war simply does not exist. To this the English Government demurred. We have reserved to ourselves the right of raising this question in the future—in the first place, because it was essential to us to arrive at an expeditious solution of the pending difficulty; and secondly, because, in point of fact, the principle here set up by us has not yet met with universal recognition in theory and practice. (Quoted in Parliamentary Papers, Africa No. 1 (1900), p. 24.)

During the war in South Africa Lord Salisbury stated the position of the British Government on what constitutes hostile destination as follows:

Lord Salisbury to Mr. Choate.

FOREIGN OFFICE, *January 10, 1900.*

DEAR MR. CHOATE: Our view is that food stuffs with a hostile destination can be considered contraband of war only if they are supplies for the enemy's forces. It is not sufficient that they are capable of being so used; it must be shown that this was in fact their destination at the time of the seizure.

Believe me, etc. SALISBURY.

(U. S. Foreign Relations, 1900, p. 555.)

On February 24, 1900, Mr. Choate reported that—

Lord Salisbury suggested that an ultimate destination to citizens of the Transvaal, even of goods consigned to British ports on the way thither, might, if the transportation were viewed as one "continuous voyage," be held to constitute, in a British vessel, such a "trading with the enemy" as to bring the vessel within the provisions of the municipal law. (U. S. Foreign Relations, 1900, p. 596.)

To the suggestion made by Mr. Salisbury, Mr. Hay said:

The Department has not failed to observe the suggestion made to Mr. Choate by Lord Salisbury that an ultimate destination to citizens of the Transvaal, even of goods consigned to British ports on the way

thither, might, if transportation were viewed as one "continuous voyage," be held to constitute, in a British vessel, such a "trading with the enemy" as to bring the vessel within the provisions of the municipal law.

In view of the prospect of a practical solution of the question of the seizures along the lines arranged between Mr. Choate and Her Majesty's Government, it is not deemed necessary for the Department to express at present either its assent or dissent to the said suggestion; but it would regret to have such an issue actually raised by the British Government, and it does not seem probable that it will be done, either on account of the seizures made in the future or through the failure to consummate the settlement already arranged for the seizures which have been made. (U. S. Foreign Relations, 1900, p. 609.)

In referring to the doctrine of continuous voyage as applied by Great Britain during the South African war, Professor Despagnet gives the position which is maintained by many European writers. He says:

Pour nous, la théorie de la continuité de voyage est toujours inadmissible, même dans le cas où il s'agit de contrebande dirigée vers un pays neutre limitrophe de l'État ennemi qui n'a pas d'accès à la mer. Mais, objecte-t-on, la répression de la contrebande est alors impossible et le pays ennemi recevra impunément des armes et des munitions venant de l'étranger au détriment de son adversaire impuissant à s'y opposer? Nous répondons que ce résultat n'est pas plus fâcheux ni plus inique que la faculté laissée au belligérant, pays maritime, d'arrêter la contrebande au préjudice de son ennemi, tandis que celui-ci, faute de marine, ne pourrait entraver en rien l'arrivée de la contrebande dans les ports de l'autre. N'était-ce pas choquant de voir l'Angleterre acheter et recevoir, sans obstacle, de l'étranger, des canons, des obus, des chevaux, des mulets, etc., tandis que les croiseurs brittaniques fermaient aisément la voie des ports de la Mozambique, la seule par laquelle la contrebande pouvait parvenir aux Boërs? Entre deux pays maritimes, la situation est égale au point de vue de la répression de la contrebande, ou du moins l'inégalité n'existe entre eux que par suite de la différence possible de leurs forces sur mer, tandis que, en cas de guerre entre un pays maritime et un autre qui ne l'est pas, si l'on autorise la saisie de la contrebande dirigée vers un pays neutre qui sépare ce dernier de la mer, on ne maintient la possibilité de la saisie que pour le pays maritime tandis qu'elle est impossible pour l'autre. Même en écartant la théorie du voyage continu en pareil cas, il n'en restera pas moins que le pays non maritime souffrira d'une inégalité fâcheuse, soit parce que les transports par terre sont plus onéreux et parfois plus longs, soit parce qu'il se heurtera souvent au mauvais vouloir ou aux scrupules des pays neutres dont le territoire le sépare de la mer et qui pourront entraver le passage à leur frontière des objets de contrebande; du moins cette inégalité

vient-elle d'un fait inéluctable, de la situation topographique du belligérant, et il est inadmissible qu'on l'aggrave par une prétendue fiction juridique, la continuité de voyage qui aboutit à une véritable injustice." (Revue Générale de Droit International Public, 1900, p. 810.)

Other cases involving destination of cargo.—The effect of destination on the liability of goods is very important, as is seen in the case of the *Peterhoff*, in 1866 (5 Wallace Supreme Court Reports, 28):

> And contraband merchandise is subject to a different rule in respect to ulterior destination than that which applies to merchandise not contraband. The latter is liable to capture only when a violation of blockade is intended; the former when destined to the hostile country or to the actual military or naval use of the enemy, whether blockaded or not. The trade of neutrals with belligerents in articles not contraband is absolutely free unless interrupted by blockade; the conveyance by neutrals to belligerents of contraband articles is always unlawful, and such articles may always be seized during transit by sea. Hence, while articles not contraband might be sent to Matamoras, and beyond to the rebel region, where the communications were not interrupted by blockade, articles of a contraband character, destined in fact to a State in rebellion or for the use of the rebel military forces, were liable to capture though primarily destined to Matamoras.

The appeal of the shippers on the *Springbok* to the British Government led to an investigation. Earl Russell decided that there was not sufficient reason to interfere, as the evidence seemed to show—

> That the cargo of the *Springbok*, containing a considerable portion of contraband, was never really and *bona fide* destined for Nassau, but was either destined merely to call there or to be immediately transshipped after its arrival there without breaking bulk and without any previous incorporation into the common stock of that colony, and then to proceed to its real destination, being a blockaded port. (Parliamentary Papers, Misc. No. 1 (1900).)

The case of the Dutch vessel *Doelwyk* has given rise to discussion. This case involves the application of the doctrine of continuous voyage to a vessel bound to a port in a neutral territory, which port was the natural port of entry to a country which had no seacoast.

The *Doelwyk* was captured on August 8, 1896, by the Italian cruiser *Etna* at a point in the Red Sea about 10 miles off the French port of Djibouti. There was a state

of war between Italy and Abyssinia. The cargo consisted mainly of arms and munitions of war. The seizure of the *Doelwyk* was upon the high seas. The immediate destination seemed to be a neutral port from which transportation to the belligerent territory would be easy. The cargo was mainly contraband.

The rule of the Italian code for the merchant marine in Article 215[a] provides that—

> Neutral vessels having a cargo in part or wholly contraband bound for the enemy country shall be captured and brought into a home port, where the ship and contraband merchandise will be confiscated and the other merchandise be subject to the disposition of the owners.

Various technical questions in regard to the declaration of war and the conclusion of peace were raised, but the decision of the prize court condemned the vessel and contraband cargo; but the decision was not carried out because of the conclusion of peace. The decision, however, admits the doctrine of continuous voyage, even when land transportation over neutral territory must take place before the contraband reaches its hostile destination. (For text of decision see Gazetta ufficiale, December 15, 1896.)

The second stage of transportation, from the neutral port to the enemy, in the case of the *Springbok* was from a neutral port to the enemy by water, and in the case of the *Doelwyk* by land.

Both cases sustained the doctrine of continuous voyage. Both decisions have received much criticism.

The general principle is that contraband is liable to seizure when destined for the enemy. The question of destination therefore becomes a vital one. The doctrine of continuous voyage is an attempt to set up a real prospective destination in face of an immediate apparent destination. This doctrine may apply to both ship and cargo or to cargo alone.

As applied to the ship it is an attempt to bring by judi-

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[a] ART. 215. "Le navi neutrali criche in tutto od in parte di generi di contrabando di guerra dirette ad un paese nemico, saranno catturate e condotte in uno dei porti dello Stato dose la nave e la merce di contrabando saranno confiscate, e le altre mercanzie lasciate a disposizione dei proprietarii."

cial action the consequences of a voyage from a neutral to a belligerent port to bear on a voyage between neutral ports. The guilt attaching to the voyage to the belligerent port is cast back on the voyage to a neutral port. It is an attempt to punish an intent which is not always capable of proof.

The United States had in 1866 set forth principles which formed a precedent for some of these later cases. This case introduced also the question of destination by overland transportation from the port at which the goods were to be landed as a factor in determining the treatment of the goods before reaching the port. In the case of the *Peterhoff* mention was made of the application of the same principles set forth in the case of the *Bermuda*. Of this Chief Justice Chase, delivering the opinion of the Court, says:

> There is an obvious and broad line of distinction between the cases. The *Bermuda* and her cargo were condemned because engaged in a voyage ostensibly for a neutral, but in reality, either directly or by substitution of another vessel, for a blockaded port. The *Peterhoff* was destined for a neutral port with no ulterior destination for the ship, or none by sea for the cargo to any blockaded place. In the case of the *Bermuda*, the cargo destined primarily for Nassau could not reach its ulterior destination without violating the blockade of the rebel ports, in the case before us the cargo, destined primarily for Matamoras, could reach an ulterior destination in Texas without violating any blockade at all.
>
> We must say, therefore, that trade between London and Matamoras, even with intent to supply, from Matamoras, goods to Texas, violated no blockade, and can not be declared unlawful.
>
> Trade with a neutral port in immediate proximity to the territory of one belligerent, is certainly very inconvenient to the other. Such trade, with unrestricted inland commerce between such a port and the enemy's territory, impairs undoubtedly, and very seriously impairs, the value of a blockade of the enemy's coast. But in cases such as that now in judgment, we administer the public law of nations and are not at liberty to inquire what is for the particular advantage or disadvantge of our own or another country. We must follow the lights of reason and the lessons of the masters of international jurisprudence.

Later in the same case, speaking of the contraband goods on board the *Peterhoff*, the Chief Justice says:

> It is true that even these goods, if really intended for sale in the market of Matamoras, would be free of liability, for contraband may

be transported by neutrals to a neutral port, if intended to make part of its general stock in trade. But there is nothing in the case which tends to convince us that such was their real destination, while all the circumstances indicate that these articles, at least, were destined for the use of the rebel forces then occupying Brownsville, and other places in the vicinity. (5 Wallace, Supreme Court Reports, 28.)

Rules and regulations as to destination.—A committee of the Institute of International Law reported on the matter of continuous voyages in 1896. This committee included Lord Reay, Messrs. Barclay, Holland, and Westlake from England, who naturally represented the English point of view. While there was some opposition to the admission of the doctrine, and some desired that the status of contraband be admitted only when goods were bound for an immediate hostile destination, yet the vote of the Institute was for the recognition of the principle that the established final destination was the determining factor.

The rule is as follows:

La destination pour l'ennemi est présumée lorsque le transport va à l'un de ses ports, où bien à un port neutre qui, d'après des preuves evidentes et de fait incontestable, n'est qu'une étape pour l'ennemi, comme but final de la même opération commerciale. (Annuaire de l'Institut de Droit International, 1896, p. 231.)

The Japanese regulations, of March 7, 1904, relating to capture at sea, provide:

ART. 15. The general rule shall be that the destination of a ship is the destination of her cargo.

ART. 16. In the case of a ship, the destination of which is not the enemy's territory, should an intermediate port at which she calls during her voyage be the enemy's territory, or should there be a presumption that she is sailing to meet a ship of war or other ship of the enemy, her destination shall be held to be the enemy's territory.

ART. 17. In the case of a ship, the destination of which is not the enemy's territory, whether she calls at that destination and discharges cargo or not, if there is reason to believe that the cargo in question is being conveyed to the enemy's territory, her voyage shall be regarded as a continuous voyage, and her destination shall be held to have been, from the commencement, the enemy's territory.

Conclusion.—The change in the means and methods of transportation has made new regulations necessary. With the increased opportunity for easy and quick intercourse between the enemy and neutral ports has come a corre-

sponding danger to the other belligerent. Against this danger he must have an increased ability to protect himself. There may be a case in which a maritime state is at war with a state having no seaport. The regular port of entrance to the inland state may be within neutral territory. With this state there is no war, therefore the port is not subject to blockade, and the transportation of supplies in this manner can not be interrupted by blockade. The supplies can not be classed as contraband if the destination of the vessel is to determine the destination of the cargo. Under the strict interpretation of the old rules no pressure could be put on the inland state by cutting off supplies of warlike material thus transported. It is obvious that such a condition would be unjust and would deprive the belligerent of the right to prevent trade in contraband destined for his enemy. The interposition of an ostensible neutral destination might be possible in many other instances, even when both belligerent states were maritime states. In the case of the war with the inland state, it is claimed there would be no more than the exercise of a war right in visiting and searching and sending in for adjudication by a prize court vessels carrying cargo in fact destined for the enemy if taken outside neutral jurisdiction. Similarly in cases where the hostilities might be between maritime states, it is only reasonable to look to the actual destination of the contraband goods. In such cases the proof of hostile destination should be reasonable and not simply a remote inference.

It may be said that the doctrine of continuous voyages, as set forth in the cases consequent upon the civil war, is a considerable extension of the doctrine as understood before that time. In some instances the decisions seem to have followed the lines of policy rather than legal precedent or reasoning.

As shown above, the American position has been widely criticised and condemned. Many of the best authorities have been thoroughly opposed to the American view. These authorities represent practically all states. It should be noted, however, that in some instances the criticism is not so much directed toward the principle in-

volved as toward the application of the principle without abundant proof. Even Gessner, while vigorously opposing the *Springbok* decision, admits that the question is really one of actual destination of the cargo for enemy use. He maintains that seizure is warranted in case hostile destination of the cargo is clearly established, even though the articles are *in transitu* to a neutral port which may be merely an intermediate stopping place from which the contraband will be forwarded to a hostile destination. He also admits that a hostile destination might be evident if a belligerent fleet were in a neutral port.

It has sometimes been stated that the application of the doctrine of continuous voyage limits the freedom of neutral commerce. The trade in contraband is undertaken in time of war particularly because of the exceptional profits. The profits of successful trade in contraband articles at such a time are exceptional because the possession of such articles by the one belligerent gives him an advantage over the other belligerent which he would not otherwise have. For this advantage he is willing to pay a war price. The neutral furnishing him this advantage should not be permitted to act with impunity, nor is it reasonable that the other belligerent should be required to permit such action. The whole transaction would be contrary to the spirit of the laws of neutrality and would simply serve to mask an unneutral act as a formally legitimate transaction. There is no reason to regard a voyage as more legitimate because made more circuitously. The number of stopping places does not necessarily change the ultimate destination of a vessel nor the number of transshipments the destination of its cargo.

The name under which the various aspects of this matter have been usually treated has served to unduly obscure the essential questions. These are such as: Is the destination of the vessel a blockaded port, even though stopping at a neutral port on the voyage? Is the destination of the cargo a blockaded port? If the cargo is contraband is it destined for the enemy even though directed toward a neutral port? The destination of vessel or cargo is the fact that determines its treatment.

It seems hardly possible that valid objection can be raised against this position, which has become more and more recognized. It is not necessary to stretch the ancient opinions or practices to cover new conditions.

In reply to the question, "What position should be assumed on the doctrine of continuous voyage?" it may be properly maintained that the doctrine, when clearly defined, should prevail. This means that the vessel and cargo may be captured wherever such vessel and cargo may be found outside of neutral jurisdiction, in case there is ample evidence of destination to a blockaded port and that the interposition of a neutral port of call does not, whatever acts may there be performed, change the destination. This also means the treatment of the cargo is to be determined by its actual destination at the time of visit. It makes no difference whether a cargo destined for the enemy is carried on a final stage of its journey by overland or over-sea transportation, the destination of the cargo is the essential fact, not the means by which it may reach its destination. Of course, the belligerent is always liable for any seizures which may be made of vessels and cargoes having innocent destinations, and for improper seizures damages must be paid. Ample evidence would therefore be necessary to justify seizure.

Regulation.—As it has been shown from precedent, practice, regulations, and rules that the destination is the essential fact in determining the treatment of vessel and cargo, the regulation in regard to the doctrine of continuous voyage should particularly cover this point. A vessel and cargo is liable to capture if it has for its destination a blockaded port, a besieged place, the fleet of the enemy, or similar belligerent destination. Outside of neutral jurisdiction contraband goods belonging to or destined for the enemy's military forces are liable to capture even though the vessel carrying the goods may be bound for a neutral port.

The regulation may then be briefly stated as follows:

The actual destination of vessels or goods will determine their treatment on the seas outside of neutral jurisdiction.

Topic VI.

Should the Declaration of Paris, 1856, be revised.

CONCLUSION.

The Declaration of Paris, 1856, should be revised.[a]

DISCUSSION AND NOTES.

Recognition of rights of those engaged in maritime commerce.—Neutrality, as now understood, was practically unknown in the Middle Ages. Grotius, in 1625, had only a vague idea of this status. Trade had, however, very early brought about a recognition of the rights of those engaged in commerce. Distinctions were made according to the nature of the goods and the nationality of the vessel carrying the goods.

The States of northern Europe gradually inclined toward the principle of "free ships free goods," which was enunciated in the treaty of Utrecht in 1713, Aix-la-Chapelle, 1748, and supported in the armed neutrality of 1780 and of 1800. Other nations opposed, and practice and profession varied with the times. Many discussions on the status of private property at sea took place in the early days of the United States.

The principle of "free ships, free goods," except contraband of war, has been widely inserted in United States treaties—Algiers, 1815, 1816; Bolivia, 1858; Brazil, 1828; Colombia (New Granada), 1846; Dominican Republic, 1867; Ecuador, 1839; France, 1778; Guatemala, 1849; Haiti, 1864; Italy, 1871; Mexico, 1831, and many others. At the present time the principle is inserted in treaties in

[a] For the binding force of this Declaration see notes on Protocol No. 24, p. 110.

force with Bolivia, 1858; Brazil, 1828; Colombia, 1846; Haiti, 1864; Italy, 1871; Peru, 1856; Prussia, 1785; Russia, 1854; Sweden and Norway, 1783.

The position of Great Britain and France in 1854 was such as to give great weight to any declaration which might be made by these states. Their attitude toward the treatment of neutral property at sea and toward privateering before this time had not been the same. It was necessary, however, that in regard to affairs in southeastern Europe they act together. Discussions in regard to policy of maritime warfare took place, and they gradually approached an agreement upon the treatment of neutral property, privateering, and blockade, which prepared the way for the declaration of Paris in 1856.

The British declaration, with reference to neutrals and letters of marque, March 28, 1854, and the French declaration were practically the same:

> Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, having been compelled to take up arms in support of an ally, is desirous of rendering the war as little onerous as possible to the powers with whom she remains at peace.
>
> To preserve the commerce of neutrals from all unnecessary obstruction Her Majesty is willing, for the present, to waive a part of the belligerent rights appertaining to her by the law of nations.
>
> It is impossible for Her Majesty to forego the exercise of her right of seizing articles contraband of war and of preventing neutrals from bearing the enemy's dispatches, and she must maintain the right of a belligerent to prevent neutrals from breaking any effective blockade which may be established with an adequate force against the enemy's forts, harbors, or coasts.
>
> But Her Majesty will waive the right of seizing enemy's property laden on board a neutral vessel unless it be contraband of war.
>
> It is not Her Majesty's intention to claim the confiscation of neutral property, not being contraband of war, found on board enemy's ships, and Her Majesty further declares that being anxious to lessen as much as possible the evils of war and to restrict its operations to the regularly organized forces of the country it is not her present intention to issue letters of marque for the commissioning of privateers. Westminster, March 28, 1854. (46 State Papers, p. 36.)

The Declaration of Paris, 1856.—The rights which France and Great Britain had thus waived by the concurrent declarations of March 28–29, 1854, naturally became the subject of negotiation at the close of the war. At the

conference of Paris in 1856 these matters were brought forward and advanced measures were urged by the French representatives. There resulted the enunciation of the set of rules known as the declaration of Paris of 1856.

The Declaration of Paris as given by Hertslet, "Map of Europe by Treaty" (ii, p. 1282), is as follows:

The Plenipotentaries who signed the Treaty of Paris of the 30th of March, 1856 (No. 264), assembled in Conference,—Considering:

That Maritime Law, in time of War, has long been the subject of deplorable disputes;

That the uncertainty of the law and of the duties in such a matter, gives rise to differences of opinion between Neutrals and Belligerents which may occasion serious difficulties, and even conflicts;

That it is consequently advantageous to establish a uniform doctrine on so important a point;

That the Plenipotentaries assembled in Congress at Paris cannot better respond to the intentions by which their Governments are animated, than by seeking to introduce into international relations fixed principles in this respect;

The above-mentioned Plenipotentaries, being duly authorized, resolved to concert among themselves as to the means of attaining this object; and, having come to an agreement, have adopted the following solemn Declaration:

PRIVATEERING.

1. Privateering is, and remains abolished.

NEUTRAL FLAG.

2. The Neutral Flag covers Enemy's Goods, with the exception of Contraband of War.

NEUTRAL GOODS.

3. Neutral Goods with the exception of Contraband of War, are not liable to capture under Enemy's Flag.

BLOCKADES.

4. Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.

The Governments of the Undersigned Plenipotentaries engage to bring the present Declaration to the knowledge of the States which have not taken part in the Congress of Paris, and to invite them to accede to it.

Convinced that the maxims which they now proclaim cannot but be received with gratitude by the whole world, the undersigned Plenipotentaries doubt not that the efforts of their Governments to obtain the general adoption thereof, will be crowned with full success.

The present Declaration is not and shall not be binding, except between those Powers who have acceded, or shall accede, to it.

Done at Paris, the 16th of April, 1856.

To this declaration all important States adhered except Mexico, Spain, and the United States. Spain and Mexico agreed, except to the abolition of privateering. The United States desired the exemption of all private property from seizure.

Protocol No. 24.—In addition to the Declaration of Paris of April 16, 1856, there was a protocol numbered 24 containing the following:

On the proposition of Count Walewski, and recognizing that it is for the general interest to maintain the indivisibility of the four principles mentioned in the declaration signed this day, the plenipotentiaries agree that the powers which shall have signed it, or which shall have acceded to it, can not hereafter enter into any arrangement in regard to the application of the right of neutrals in time of war, which does not at the same time rest on the four principles which are the object of the said declaration.

By the above agreement the powers are bound. As Count Walewski said in a letter to Count de Sartiges in May, 1856:

The plenipotentiaries assembled in the congress of Paris have come to an agreement on the terms of a declaration intended to settle the principles of maritime law in so much as it concerns neutrals during war. Herewith I have the honor to transmit to you a copy of that act, which fully meets the tendencies of our epoch, and at once puts an end to the useless calamities which a custom equally reprobated by reason and by humanity, superadded to those which fatally result from a state of war.

The congress have not overlooked the fact that their work, in order that it may prove complete, must secure the assent of all the maritime powers, since such governments only as shall have acceded to the arrangement can be mutually bound by it. On this score we attach peculiar value to the concurrence of the United States, that will not consent, we confidently trust, to hold off from a concert of action which defines a new and essential progress in international relations.

The determination of the congress of Paris defines the object which it is intended to attain. The clashing constructions given to the rights of neutrals have, up to the last year, proved a source of deplorable conflicts, whilst privateering inflicted on the commerce and navigation of nonbelligerent states an injury so much the more grievious as it gave room for the most calamitous excesses.

These, Count, are the events which, for our part, we are happy in striving to repel, and we feel convinced that the concurrence of the United States will not be withheld in a question every way worthy of the philanthropic spirit of the American people; a question which at once, and in a high degree, concerns the development and the security of commercial transactions.

The plenipotentiaries sent to the congress have, as you may see in portocol No. 24, bound themselves, in the name of their respective governments, to enter, for the future, into no arrangement on the application of maritime law in time of war without stipulating for a strict observance of the four points resolved by the declaration. The concurrence which we solicit at the hands of those governments which were not represented in the Paris conferences can, consequently, apply to those principles only laid down in said declaration, and which are indivisible. (Senate Ex. Doc., 34th Cong., 1st Sess., No. 104, p. 2.)

Attitude of the United States.—The attitude of the United States was thus expressed in President Pierce's message of December 4, 1854:

The proposition to enter into engagements to forego a resort to privateers, in case this country should be forced into a war with a great naval power, is not entitled to more favorable consideration than would be a proposition to agree not to accept the services of volunteers for operations on land. When the honor or rights of our country require it to assume a hostile attitude it confidently relies upon the patriotism of its citizens, not ordinarily devoted to the military profession, to augment the Army and Navy, so as to make them fully adequate to the emergency which calls them into action. The proposal to surrender the right to employ privateers is professedly founded upon the principle that private property of unoffending noncombatants, though enemies, should be exempt from the ravages of war; but the proposed surrender goes but little way in carrying out that principle, which equally requires that such private property should not be seized or molested by national ships of war. Should the leading powers of Europe concur in proposing, as a rule of international law, to exempt private property upon the ocean from seizure by public armed cruisers as well as by privateers, the United States will readily meet them upon that broad ground.

The United States Government wished to extend the provision of the Declaration of Paris, saying:

The injuries likely to result from surrendering the dominion of the seas to one or a few nations which have powerful navies arise mainly from the practice of subjecting private property on the ocean to seizure by belligerents. Justice and humanity demand that this practice should be abandoned, and that the rule in relation to such property on land should be extended to it when found upon the high seas.

The President therefore proposes to add to the first proposition in the "declaration" of the congress at Paris the following words: "And that the private property of the subject or citizens of a belligerent on the high seas shall be exempted from seizure by public armed vessels of the other belligerent, except it be contraband." Thus amended, the Government of the United States will adopt it, together with the other three principles contained in that "declaration."

I am directed to communicate the approval of the President to the second, third, and fourth propositions, independently of the first, should the amendment be unacceptable. The amendment is commended by so many powerful considerations, and the principle which calls for it has so long had the emphatic sanction of all enlightened nations in military operations on land, that the President is reluctant to believe it will meet with any serious opposition. Without the proposed modification of the first principle, he can not convince himself that it would be wise or safe to change the existing law in regard to the right of privateering. (Senate Ex. Doc., 34th Cong., 1st sess., No. 104, p. 13.)

It was well understood, as shown by the discussions, that the principles set forth in the Declaration of Paris were advanced opinions. Protocol No. 22 of the session of April 8, 1856, relates that—

M. le Comte Walewski propose au Congrès de terminer son œuvre par un déclaration qui constituerait un progrès notable dans le droit international, et qui serait accueillie par le monde entier avec un sentiment de vive reconnaissance.

Le Congrès de Westphalie, ajoute-t-il, a consacré la liberté de conscience, le Congrès de Vienne l'abolition de la Traite des noirs et la liberté de la navigation des fleuves.

Il serait vraiment digne du Congrès de Paris de poser les bases d'un droit maritime en temps de guerre, en ce qui concerne les neutres. Les 4 principes suivants atteindraient complétement ce but:

1. Abolition de la course;

2. Le pavillon neutre couvre la marchandise ennemie, excepté la contrebande de guerre;

3. La marchandise neutre, excepté la contrebandede guerre, n'est pas saisissable même sous pavillon ennemi;

4. Les blocus ne sont obligatoires qu'autant qu'ils sont effectifs.

Ce serait certes là un beau résultat auquel aucun de nous ne saurait être indifférent.

The Declaration of Paris certainly does not meet with that general approval which its promoters had anticipated, and as time passes it becomes more and more in need of revision. As Duboc says:

La Declaration de Paris n'établit donc, à tout prendre, qu'un régime précaire, non sans danger pour les belligérants, non sans péril pour les neutres. Aussi beaucoup parmi ses partisans et parmi sas adversaires pensent-ils qu'elle n'est las définitive. Tandis que ceux-ci demandent qu'on la dénonce, ceux-là prétendent qu'on la compléte. Les premiers estiment qu'on aresserré les droits des belligérants dans des limites trops restreintes, les autres, qu'on leur accorde encore des libertés excessives. Ces derniers prétendent parfaire le droit maritime et assurer définitivement la sécurité des neutres en supprimant toute confiscation de la propriete ennemie. (Le Droit de la Guerre Maritime, p. 71.)

There are many differences of opinion in regard to the phraseology of the Declaration of Paris. Some prefer a more explicit definition, others would retain the general terms. (Perels, Seerecht, section 49, I.) Thonier in a recent work says:

Malgré le progrès immense qu'elle a réalisé, en faisant passer de la doctrine dans la pratique la liberté du commerce neutre, la declaration fe Paris présente cependant quelques lacunes. Elle n'a pas osé aller jusqu'au bout dans la voie des réformes libérales et déclarer, ainsi que le proposaient les États-Unis, l'inviolabilité de la propriéte privée sur la mer.

Elle est même inférieure à la Déclaration russe de 1780, en ce qui regarde le blocus, par l'absence de prescriptions concernant le rapprochement des forces bloquantes, ce qui permet les blocus por croisière.

Enfin, elle garde le silence au sujet de la contrebande de guerre, dont il y aurait eu si grand intérêt à donner une définition précise et énumération. (De la Notion de Contreband de Guerre, p. 39.)

1. "*Privateering is and remains abolished.*"—It might with good reason perhaps be contended that in the first place the term "declaration" is not properly applicable to the action taken by the plenipotentiaries on April 16, 1856, and known as the "Declaration of Paris."

The provisions of the so-called "declaration" are, however, of great importance.

The plenipotentiaries, according to the terms of the Declaration, consider "that maritime law in time of war has long been the subject of deplorable disputes." To avoid some of the disputed points they hope to establish "a uniform doctrine" and "having come to an agreement" have adopted the "solemn declaration."

A serious objection was at the time raised against this Declaration, to the effect that of the plenipotentiaries who

signed it, some had no authorization to act in the matter, but as their action was never disclaimed it must be held to be binding. It is held in Great Britain that so far as the Declaration itself is concerned it has never been properly authorized.

The obvious intent of the first clause of the Declaration of Paris, "Privateering is and remains abolished," was that from the date of its adoption war should be confined to the regularly commissioned vessels built for hostile purposes. Debates and discussions of the rule show that it was thus understood by many officials in its early days. Doubtless the opposition to the rule would have been much less marked in the United States if it had been understood to mean merely that from its adoption the use of private vessels for belligerent purposes shall be allowed only when they are under responsible control of one of the belligerents.

T. G. Bowles, writing in 1878 after there had been much discussion on the subject, shows that the effect of the first clause of the Declaration of Paris abolishing privateering is open to differences of interpretation. Of the general provisions of the Declaration he says:

> The effect of them upon Great Britain is without doubt and beyond question greater than upon any other power, because Great Britain, being the principal maritime power in the world, must feel more than, any other the effects of any change in the laws of maritime warfare. And the fact that Great Britain has shown herself before the change was made able to resist the whole of Europe in arms, and to come victorious out of the struggle by the very aid of the very principles now declared to be abrogated and reversed, must lead us to conclude in limine that the change made is one fraught with especial disadvantage to her. Let us, however, examine the changes themselves and their effects.
>
> I. "Privateering is and remains abolished," that is to say, is abolished for Great Britain whenever she is at war with any other States than the United States or Spain; but not when she is at war with either of those two. The effect of this is to deprive Great Britain of the services of volunteers at sea, and to preclude her from employing in warlike operations either the vessels or the men of her vast mercantile marine; for a privateer is but a private vessel commissioned by the State. She loses thus not only an offensive but also a defensive weapon; for privateers do not only capture enemy's vessels, but also recapture those of their own nation; and they are to the State navy a

most valuable auxiliary, without which an amount of power proportioned to the size of the mercantile marine of the State remains unemployed in time of war. She loses the power of withdrawing a considerable number of merchant vessels from exposure to the enemy as unarmed merchantmen by turning them into offensive weapons as armed cruisers, and thus at once diminishing the number of vessels liable to be captured and increasing the number of those able to capture. She loses one of the best schools for the formation of daring and adventurous sailors, and with it those traditions of prize money won in conflict, which have always been found the most urgent incentive to daring and adventurous men. (Maritime Warfare, p. 83.)

It may be safely said that prior to the time of the Declaration the first clause, viz, "Privateering is and remains abolished," would have been regarded as a proposition very liable to stir up unnecessary "deplorable disputes." Privateering had been an accepted means of warfare which was supposed to give to a state an opportunity to enlarge its navy. In regard to privateering, Secretary Marcy, in a letter of July 28, 1856, to Count Sartiges, said that for those powers acceding to the Declaration of Paris it would be necessary to "surrender a principle of maritime law which has never been contested—the right to employ privateers in time of war." The first clause of the Declaration can not be properly regarded as one whose introduction removed disputes.

It has been the object of much criticism. In the first place, the Declaration is a convention binding signatory powers only. Many of the leading men in the states which became parties to the Declaration were opposed to this provision. Some maintained that it was not sufficiently definite, but would give rise to action in effect like privateering under another name, or so masked as to avoid condemnation under the letter of the law. Such critics also maintained that what was needed was an agreement as to the use of private or quasi-private vessels in time of war, with such regulations as would avoid the evils of privateering. The truth of this position as to the need of definite regulations for the use of such vessels in time of war has become more and more evident since 1856, and the status of voluntary or auxiliary fleets is at present a mat-

ter of uncertainty, involving grave consequences. Just what was really abolished and remained abolished under the first clause of the Declaration has become an increasingly important question.

The United States were willing to accede to the Declaration when it was thought that it would work to the advantage of the North against the South, at the opening of the civil war.

The French Academy had discussed the question of abolition of privateering in 1860, and the practice of privateering was ably defended. It was not denied that privateering should be regulated, for this was generally admitted. It was not quite clear what the word "privateering" included. The discussion as to the definition of the word was renewed through the action of the Prussian Government in 1870.

It is necessary that the provision in regard to privateering be merged in the question of the regulation of the status of private or quasi-private ships which in time of war are introduced into the military forces of the belligerent.

Mr. F. R. Stark, in his careful study on the "Abolition of privateering," says:

> The Declaration of Paris is truly, as Mr. Marcy said, a halfway measure. It is inchoate, unfinished, and, it can not be denied, somewhat faulty, as the first steps of all great reforms have been. But to call it an epoch-making event or a red-letter day in the calendar of the law of nations would be superfluous. Perhaps that which is to come—the abolition of all capture of private property at sea, including the abolition of commercial blockades—is easier than that which has already been accomplished. In international law, as in other things, it is the first step that costs (p. 159).

Attitude of United States on abolition of privateering.—On the clause in regard to privateering, Mr. Marcy, in his letter to Count Sartiges, makes various comments, among which is the following:

> If the principle of capturing private property on the ocean and condemning it as prize of war be given up, that property would, and of right ought to be, as secure from molestation by public armed vessels as by privateers; but if that principle be adhered to, it would be

worse than useless to attempt to confine the exercise of the right of capture to any particular description of the public force of the belligerents. There is no sound principle by which such a distinction can be sustained, no capacity which could trace a definite line of separation proposed to be made, and no proper tribunal to which a disputed question on that subject could be referred for adjustment. The pretense that the distinction may be supported upon the ground that ships not belonging permanently to a regular navy are more likely to disregard the rights of neutrals than those which do belong to such a navy is not well sustained by modern experience. If it be urged that a participation in the prizes is calculated to stimulate cupidity, that, as a peculiar objection, is removed by the fact that the same passion is addressed by the distribution of prize money among the officers and crews of ships of a regular navy. Every nation which authorizes privateers is as responsible for their conduct as it is for that of its navy, and will, as a matter of prudence, take proper precaution and security against abuses.

But if such a distinction were to be attempted, it would be very difficult, if not impracticable, to define the particular class of the public maritime force which should be regarded as privateers. "Deplorable disputes," more in number and more difficult of adjustment, would arise from an attempt to discriminate between privateers and public armed ships.

If such a discrimination were attempted, every nation would have an undoubted right to declare what vessels should constitute its navy and what should be requisite to give them the character of public armed ships. These are matters which could not be safely or prudently left to the determination or supervision of any foreign power, yet the decision of such controversies would naturally fall into the hands of predominant naval powers, which would have the ability to enforce their judgments. It can not be offensive to urge weaker powers to avoid as far as possible such an arbitrament and to maintain with firmness every existing barrier against encroachments from such a quarter.

No nation which has a due sense of self-respect will allow any other, belligerent or neutral, to determine the character of the force which it may deem proper to use in prosecuting hostilities; nor will it act wisely if it voluntarily surrenders the right to resort to any means sanctioned by international law which, under any circumstances, may be advantageously used for defense or aggression. (Senate Ex. Doc. No. 104, 34th Cong., 1st. sess., p. 9.)

2. *Free ships, free goods.*—The second clause of the Declaration of Paris is:

The neutral flag covers enemy's goods with the exception of contraband of war.

This phraseology has given rise to certain misconceptions particularly because some have inferred that contraband of war might be thus affirmed of enemy goods. The probable intent of the clause was to the effect that—

> The neutral flag covers enemy's goods, with the exception of such as would, if neutral, be contraband of war.

If, however, all innocent private property at sea is to be exempt from capture, whether neutral or enemy, the phraseology is correct in the main, because in such event the doctrine of contraband must be extended to enemy as well as to neutral property.

The phraseology also introduces the question of destination, which is essential in contraband. Neutral goods bound for a neutral port, even though consisting of arms and ammunition, are not contraband. Would enemy goods of similar nature bound for a neutral port be exempt from capture under a strict interpretation of the second clause of the declaration?

It may be justly held that if the belligerent is to be bound by the second clause of the Declaration, viz, "The neutral flag covers enemy's goods, with the exception of contraband of war," the neutral shall be held to make plain to the belligerent that the flag is truly neutral.

A somewhat full presentation of the effect of this Declaration upon establishing a definition of contraband of war and of the significance of Protocol No. 24 is given by Chief Justice Berkley in the case of the *Osaka Shosen Kaisha* versus the owners of the steamship *Prometheus* in 1904:

> In my opinion the expression "contraband of war" has a well-known and accepted meaning among the civilized commercial powers of the world. If that were not so we should not, as we do, find that expression used without definition in solemn treaties between the powers. The expression "contraband of war" is used without any definition of its meaning in the Treaty of Paris of the 16th April, 1856. The inference from that fact is, to my mind, irresistible that there was no definition needed, because the expression had the same definite meaning in the minds of all the plenipotentiaries of the powers parties to that treaty.
>
> The Treaty of Paris, to which Russia is a party and to which she still adheres, commences with the following preamble: "Considering

that maritime law in time of war has long been the subject of deplorable disputes, that uncertainty of the law and of the duties in such a matter gives rise to differences of opinion between neutrals and belligerents which may occasion serious difficulties, and even conflicts, that it is consequently advantageous to establish a uniform doctrine on so important a point; that the plenipotentiaries assemble in Congress at Paris can not better respond to the intention by which their Governments are animated than by seeking to introduce into international relations fixed principles in this respect." Then immediately follows this declaration: "The above-mentioned plenipotentiaries, being duly authorized, resolved to concert among themselves as to the means of attaining this object, and having come to an agreement have adopted the following solemn declaration:

(1) Privateering is and remains abolished

(2) The neutral flag covers enemy's goods, with the exception of contraband of war.

(3) Neutral goods, with the exception of contraband of war, are not liable to capture under the enemy's flag.

(4) Blockades in order to be binding must be effective—that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.

I draw special attention to the fact that the expression "contraband of war" is twice used in this declaration without being in any way defined. This declaration was designed to give effect to the opinion of the plenipotentiaries expressed in the preamble, viz, that it was to the advantage of the civilized world to establish a uniform doctrine on the subject of maritime law in time of war, and with that object in view to introduce certain "fixed principles." At the same sitting of the plenipotentiaries the following resolution was adopted (Protocol No. 24): "On the proposition of Count Walewski, and recognizing that it is for the general interest to maintain the indivisibility of the four principles mentioned in the declaration signed this day, the plenipotentiaries agree that the powers which shall have signed it, or which shall have acceded to it, can not hereafter enter into any arrangement in regard to the application of the right of neutrals in time of war which does not, at the same time, rest on the four principles which are the object of the said declaration."

It will be observed that by this Protocol the plenipotentiaries of Russia bind that Power not hereafter to adopt any attitude toward neutrals in time of war which does not rest upon the four principles enunciated in the declaration. This Protocol has an important bearing upon the contention at the Bar that Russia as an independent sovereign State possesses, as a concomitant to the right to make war, the right to declare what shall or shall not be considered contraband of war.

I dwell here upon the fact that the expression "contraband of war" occurs twice in the declaration in the treaty of Paris; that the expressions "privateering" and "blockade" occur each once; and that there

is in that declaration no definition of the meaning of any of those expressions. Why was there this omission to define these expressions?

Was it not because they each had in the minds of the plenipotentiaries of the Powers a recognized meaning at the time when the treaty was signed? And because the expression "contraband of war" no more needed definition than the expressions "blockade" or "privateering" did. What, then, was the meaning which it must fairly be assumed the plenipotentiaries attached to the expression "contraband of war," as used by them in the Treaty of Paris? It seems to me that the plenipotentiaries had in their minds the meaning which at that time attached to the expression "contraband of war" resulting from the decisions of the courts of law of the nations of Europe and America; principally, indeed, the decisions in the English courts on cases arising during the Napoleonic war. What, then, is the result of those decisions? What meaning has been thereby attached to the expression "contraband of war?" The result has been to attach to that expression the following twofold meaning: (1) Absolute contraband of war, which includes everything useful for war only; (2) that which is conditional contraband of war, which includes all which, though useful for both peace and war, becomes contraband if destined for the purposes of war, excluding from the meaning of contraband of war such things as are useful for the purposes of peace only. "Provisions," consequently, come within the definition of conditional contraband only if and when destined for the enemy's forces; otherwise they are excluded from the definition. That is, in my opinion, the true meaning to be attached to the expression "contraband of war," and that is the sense which, in my opinion, that expression bears on a true construction of the declaration of the plenipotentiaries who signed the Treaty of Paris of 1856.

The Supreme Court decision in the case of the *Peterhoff* (5 Wallace Supreme Court Reports, 28) gives an opinion on contraband:

The classification of goods as contraband or not contraband has much perplexed text writers and jurists. A strictly accurate and satisfactory classification is perhaps impracticable, but that which is best supported by American and English decisions may be said to divide all merchandise into three classes. Of these classes, the first consists of articles manufactured and primarily and ordinarily used for military purposes in time of war; the second, of articles which may be and are used for purposes of war or peace, according to circumstances, and the third, of articles exclusively used for peaceful purposes. Lawrence's Wheat., 772, 776, note; the *Commercen*, 1 Wheat., 382; Dana, Wheat., 629, note; Pars. Mar. Law, 93, 94. Merchandise of the first class, destined to a belligerent country or places occupied by the army or navy of a belligerent, is always contraband; merchandise of the second class is contraband only when actually destined to the

military or naval use of a belligerent; while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of the blockade or siege.

2. *Free goods always free.*—The third clause of the Declaration of Paris is:

Neutral goods with the exception of contraband of war are not liable to capture under enemy's flag.

Such matters as the destruction of belligerent vessels having on board neutral cargo may give rise to complications under the third clause of the Declaration. While by this clause the goods are not liable to capture they may under necessity of war be subject to severe treatment. Hall says of this matter:

In 1872 the French prize court gave judgment in a case, arising out of the war of 1870–71, in which the neutral owners of property on board two German ships, the *Ludwig* and the *Vorwärts*, which had been destroyed instead of being brought into port, claimed restitution in value. It was decided that though "under the terms of the Declaration of Paris neutral goods on board of an enemy's vessel can not be seized, it only follows that the neutral who has embarked his goods on such vessel has a right to restitution of his merchandise, or in case of sale to payment of the sum for which it may have been sold; and that the Declaration does not import that an indemnity can be demanded for injury which may have been caused to him either by a legally good capture of the ship or by acts of war which may have accompanied or followed the capture;" in the particular case "the destruction of the ships with their cargoes having taken place under orders of the commander of the capturing ship, because, from the large number of prisoners on board, no part of the crew could be spared for the navigation of the prize, such destruction was an act of war, the propriety of which the owners of the cargo could not call in question, and which barred all claim on their part to an indemnity."

It is to be regretted that no limits were set in this decision to the right of destroying neutral property embarked in an enemy's ship. That such property should be exposed to the consequences of necessary acts of war is only in accordance with principle, but to push the rights of a belligerent further is not easily justifiable, and might under some circumstances amount to an indirect repudiation of the Declaration of Paris. In the case, for example, of a state, the ships of which were largely engaged in carrying trade, a general order given by its enemy to destroy instead of bringing in for condemnation would amount to a prohibition addressed to neutrals to employ as carrier vessels, the right to use which was expressly conceded to them by the Declaration in question. It was undoubtedly intended by that Decla-

ration that neutrals should be able to place their goods on board belligerent vessels without as a rule incurring further risk, than that of loss of market and time, and it ought to be incumbent upon a captor who destroys such goods together with his enemy's vessel to prove to the satisfaction of the prize court, and not merely to allege, that he has acted under the pressure of a real military necessity. (International law 5th ed. p. 717.)

The reported acts of some of the vessels of Russia during the Russo-Japanese war also show that there is need of further provisions in the Declaration.

4. *Blockades.*[a]—Mr. Marcy's opinion in regard to the fourth clause of the Declaration, the clause in regard to effective blockade, is one which has received frequent sanction. He said:

> The fourth principle contained in the "declaration," namely: "Blockades, in order to be binding, must be effective; that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy;" can hardly be regarded as one falling within that class with which it was the object of the congress to interfere; for this rule has not for a long time been regarded as uncertain, or the cause of any "deplorable disputes." If there have been any disputes in regard to blockades, the uncertainty was about the facts, but not the law. Those nations which have resorted to what are appropriately denominated "paper blockades," have rarely, if ever, undertaken afterwards to justify their conduct upon principle; but have generally admitted the illegality of the practice, and indemnified the injured parties. What is to be adjudged "a force sufficient really to prevent access to a coast of the enemy," has often been a severely contested question; and certainly the declaration, which merely reiterates a general undisputed maxim of maritime law, does nothing toward relieving the subject of blockade from that embarrasment. What force is requisite to constitute an effective blockade, remains as unsettled and as questionable as it was before the congress at Paris adopted the "declaration." (Senate Ex. Doc. 54th Cong., 1st Sess., No. 104, p. 6.)

It is evident that the fourth clause in regard to blockade needs further clarifying from the fact that the British Admiralty Manual of Naval Prize Law adds after the clause of the Declaration of Paris the words, "Or, at any rate, to create evident danger to ships attempting ingress or egress." The general statement in regard to valid blockade in the Manual is as follows:

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[a] See also International Law Situation, 1901, Naval War College, pp. 166–175.

VALID BLOCKADE.

108. A Blockade to be valid must be confined to ports and coasts of the Enemy, but it may be instituted of one port, or of several ports, or of the whole seaboard of the Enemy.

109. It may be instituted to prevent ingress only ("Blockade inwards"), or egress only ("Blockade outwards"), though it is generally instituted to prevent both ingress and egress.

110. A Blockade to be valid must be effective—that is to say, maintained by a force sufficient really to prevent access to the coast of the Enemy, or, at any rate, to create evident danger to ships attempting ingress or egress.

111. It is therefore the first duty of a Commander authorized to institute a Blockade so to dispose his Squadron as to bring about this result. There is then in existence a Blockade de facto.

112. A Blockade, though thus validly instituted, ceases to exist if not effectually maintained. It will accordingly cease to exist if the blockading force—

1. Abandon its position, unless abandonment be merely temporary, or caused by stress of weather; or

2. Be driven away by the Enemy; or

3. Be negligent in its duties; or

4. Be partial in the execution of its duties toward one ship rather than another, or toward the ships of one nation rather than those of another.

113. Should, however, the Commander seize several Vessels at once and find himself unable to detain them all, it will not be an improper act of partiality, nor is it a relaxation of the Blockade if he releases some and detains the rest. (P. 29.)

The doctrine of blockade was not the same among the powers signatories of the Declaration of Paris. The phrase "Maintained by a force sufficient really to prevent access to the coast of the enemy" would mean for France a force which would give notification of the existence of the blockade to each vessel appearing before the port. By Great Britain no such notification is deemed necessary. A general public notification is deemed sufficient. The amount and kind of force is also a matter of much difference of opinion. Can a blockade be established by sinking stones, vessels, or other obstructions in a channel? Does a line of mines or torpedoes constitute a blockade under the definition of the Declaration of Paris? How far shall blockade by cruisers be admitted? What constitutes a sufficient number of cruisers to render a blockade effective?

Many such questions have been discussed and varying answers have been given. It is easily seen that a different course will have to be pursued to render a blockade according to the French theory effective—i. e., when notification before a port is necessary—and to render a blockade according to the British theory effective—i. e., when only a general public notification is necessary.

Some authorities have maintained that there should be before a blockaded port two lines of vessels, one of which should at a considerable distance from the port notify the approaching merchantman of the blockade and the second inner line should seize the merchantman if he then attempts to enter. Some have even maintained that in order that a blockade may be effective, the vessels of the blockading squadron should not be separated farther than the distance which the range of their guns would cover. Others maintain that the question of effectiveness depends on the amount of commerce entering a given port, and that the blockading squadron should vary in number accordingly.

What is blockade?—Various schemes have been tried by which to obtain the results of blockade for the belligerents without all its consequences.

For many years the doctrine of pacific blockade was held. Of late years this may be said to have been received with less favor. It was regarded as a means of constraint short of war.

In connection with blockade, it should be further recognized that it is a war measure and that it applies only in time of war.

It does not apply generally in time of domestic hostilities of the nature of insurgency even though a single State or even several States may have recognized the belligerency of the insurgent. If an actual state of war does not exist, blockade and its consequences is not admitted. Until the parent State recognizes the belligerency of the insurgent body, "the scale on which hostilities are conducted by the insurgents must be considered."

The position of the United States is stated in a letter of Secretary Hay of November 15, 1902. He says:

Blockade of enemy ports is, in its strict sense, conceived to be a definite act of an internationally responsible sovereign in the exercise of a right of belligerency. Its exercise involves the successive states of, first, proclamation by a sovereign state of the purpose to enforce a blockade from an announced date. Such proclamation is entitled to respect by other sovereigns conditionally on the blockade proving effective. Second, warning of vessels approaching the blockaded port under circumstances preventing their having previous actual or presumptive knowledge of the international proclamation of blockade. Third, seizure of a vessel attempting to run the blockade. Fourth, adjudication of the question of good prize by a competent court of admiralty of the blockading sovereign. (Recent Supreme Court Decisions and other Opinions and Precedents, U. S. Naval War College, 1904, p. 207.)

That there may be doubt as to what constitutes effective blockade may be seen in the replies to the Venezuelan decree of June 28, 1902. The decree was as follows:

The constitutional President of the United States of Venezuela decrees:

ARTICLE 1. In consequence of the occupation of Ciudad Bolivar by insurrectionary forces, navigation in the waters of the Orinoco is prohibited, the extent of the coast line which embraces its mouths is blockaded, and the ports of Guira and Cano Colorado are closed to trade and navigation.

ART. 2. The port of La Vela de Coro is likewise declared to be blockaded.

ART. 3. The necessary naval forces shall be appointed to enforce the said blockade in a real and efficacious manner.

ART. 4. The commanders of the ships appointed to carry out the blockade of the above-mentioned ports shall duly observe the ordinances relating to the corsairs, dated the 30th of March, 1882, now in force, and the following provisions:

1. Ships which have been dispatched for the blockaded ports shall have the following terms, after the present decree has been communicated to their respective Governments, allowed them to enter: Steamships proceeding from Europe, one month; sailing vessels, two months; steamships proceeding from the United States, fifteen days; sailing vessels, one month; ships proceeding from the West Indies and Demerara, whether steamers or sailing vessels, shall have a term of ten days, with the exception of those proceeding from Trinidad and Grenada, which shall have but two days.

2. Merchandise which is destined for any port within the line of blockade may, at the discretion of the owner, be disembarked at any

other established customs port on payment of the respective customs duties.

3. On any vessel, proceeding from any of the places above mentioned, reaching the line of blockade the commander of the nearest man-of-war shall communicate to him the order against crossing it, and in case he persist he shall be considered to wish to violate the blockade.

ART. 5. The ministers of the interior, foreign affairs, finance, and war and marine are charged to see to the execution of this decree and to communicate it to all whom it may concern.

Given, signed, sealed with the seal of the national executive and countersigned by the ministers of the interior, foreign affairs, finance, and war and marine, at the federal palace at Caracas, this 28th day of June, 1902, year 91 of the independence and 44 of the federation.

CIPRIANO CASTRO.

The United States minister, under date of September 7, 1902, reported to Secretary Hay:

SIR: I have the honor to inform you that I have learned that Germany and Great Britain based their refusal to recognize the blockade decreed by the Venezuela Government as effective on the assertion that the naval force of Venezuela is not sufficiently strong to render it effective. France confined her protest to Carupano and Cumana, stating that French ships had entered those ports without let or hindrance. I decided that, as we have no special interests in the ports blockaded, and as they seem to me likely to be occupied and abandoned from time to time by the revolutionists, it would be sufficient for me to simply remark to the minister for foreign affairs that we could not recognize as effective any blockade that we find to be ineffective. (U. S. Foreign Relations, 1902, pp. 1070, 1071.)

In an extended correspondence with the French Government the President of Venezuela tried to maintain that the blockade was effective if the vessels attempting to enter found it difficult and were in danger from Venezuelan blockaders. He said the blockading fleet was in proportion to the ordinary commerce and that most of the ships were prevented from entering, but this was not regarded as sufficient. It is not that most of the ships should be prevented, but that any ship should be in peril from attempting to enter the blockaded port.

Several cases involving questions of efficiency of blockade are briefly summarized in Atlay's edition of Wheaton's International Law:

A question respecting the efficiency of a blockade arose during the last Turco-Russian war. Turkey proclaimed a blockade of the whole

of the coasts of the Black Sea, from Trebizond to the mouth of the Danube, and maintained it by a force of cruisers in the Black Sea itself. This force prevented most of the trade with the Russian ports from being carried on, but, besides this, the Porte stationed two cruisers in the Bosphorus, and any vessels which escaped the Black Sea Squadron were captured on arriving there and taken before the Prize Court sitting at Constantinople. A more complete and efficient blockade could not possibly be devised; nevertheless it was argued for the owners of prizes that, being neutral vessels (mostly Greek), as soon as they had escaped the Black Sea Squadron they were free and were no longer liable to capture. The Turkish Prize Court, however, condemned the vessels. This case was peculiarly important from the fact that some of the foreign ambassadors at the Porte had intimated that if these vessels were not condemned the blockade would not be recognized by other countries. To hold that these Greek vessels were not liable to be captured in the Bosphorus would have been tantamount to opening the general commerce of the Black Sea to Greece, and this would have immediately invalidated the whole blockade.

The blockade of Formosa was notified by France in 1884. Great Britain protested, through its ambassador at Paris, alleging that the force at the disposal of the French admiral was insufficient. The blockade was in consequence abandoned till the arrival of reenforcements.

The blockade of insurgent Haitian ports proclaimed by Haiti in November, 1888, having ceased to be effective in the July following, Lord Salisbury notified the Haitian Government that it could not longer be respected, and that British vessels entering or leaving ports in the possession of the insurgents must not be molested by the Government cruisers. (Sections 513 b, c, d.)

The question as to what constitutes an effective blockade was raised in the case of the *Olinde Rodrigues* in 1898. In an opinion handed down by Chief Justice Fuller in 1899 (174 U. S., 510), the position of the court, with the grounds therefor, was stated as follows:

To be binding, the blockade must be known, and the blockading force must be present; but is there any rule of law determining that the presence of a particular force is essential in order to render a blockade effective? We do not think so, but, on the contrary, that the test is whether the blockade is practically effective, and that that is a question, though a mixed one, more of fact than of law.

The fourth maxim of the Declaration of Paris (Apr. 16, 1856), was: "Blockades, in order to be binding, must be effective; that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy." Manifestly this broad definition was not intended to be literally applied. The object was to correct the abuse, in the early part of the century, of paper blockades, where extensive coasts were put under blockade by proclamation, without the presence of any

force, or an inadequate force; and the question of what might be sufficient force was necessarily left to be determined according to the particular circumstances.

This was put by Lord Russell, in his note to Mr. Mason of February 10, 1861, thus: "The Declaration of Paris was in truth directed against what were once termed 'paper blockades;' that is, blockades not sustained by any actual force, or sustained by a notoriously inadequate naval force, such as an occasional appearance of a man-of-war in the offing, or the like. * * * The interpretation, therefore, placed by Her Majesty's Government on the Declaration was that a blockade, in order to be respected by neutrals, must be practically effective. * * * It is proper to add that the same view of the meaning and effect of the articles of the Declaration of Paris on the subject of blockades which is above explained was taken by the representative of the United States at the Court of St. James (Mr. Dallas) during the communications which passed between the two Governments some years before the present war with a view to the accession of the United States to that Declaration." (Hall's Int. Law, paragraph 260, p. 730, note.)

The quotations from the Parliamentary Debates of May, 1861, given by Mr. Dana in note 233 to the eighth edition of Wheaton on International Law, afford interesting illustrations of what was considered the measure of effectiveness; and an extract is also there given from a note of the Department of Foreign Affairs of France of September, 1861, in which that is defined: "Forces sufficient to prevent the ports being approached without exposure to a certain danger."

Later in the same case it is stated:

As we hold that an effective blockade is a blockade so effective as to make it dangerous in fact for vessels to attempt to enter the blockaded port, it follows that the question of effectiveness is not controlled by the number of the blockading force. In other words, the position can not be maintained that one modern cruiser, though sufficient in fact, is not sufficient as matter of law.

The definition of effective blockade was not sufficiently clear to all. Fauchille says:

La définition du blocus donnée par le congrès de Paris n'est pas aussi précise qu'elle aurait dû être. Sans doute, elle prohibe certainement le blocus fictif qu'on appelle blocus *sur papier*, en vertu duquel, d'un trait de plume, un gouvernement met en état de siège des ports et des côtes entières; mais exclut-elle aussi formellement le blocus par croisière?

and later,

Nous ne croyons point toutefois que cette déclaration ait voulu précisément autoriser les blocus par croisière; elle ne les a pas désavoués

expressement, elle les a désavoués d'une façon indirecte seulement. Si la première phrase est indécise et peut permettre à l'Angleterre, dont elle est l'œuvre, de revenir à son ancienne pratique, la dernière phrase est au contrairie plus précise et se rapproche d'une définition exacte du blocus effectif: En effet, il faut, d'après elle, que l'accès du littoral ennemi soit interdit réellement, soit rendu impossible par les forces bloquantes; or dans le blocus par croisière ce n'est pas l'abord de la côte qui est défendu, mais des vaisseaux croisant à une grande distance du port bloqué arrêtent les bâtiments qui s'y dirigent.

Quoi qu'il en soit, nous ne pouvons approuver une définition qui prête ainsi à double sens, et nous appelons de tous nos vœux le jour où les puissances, se dépouillant enfin des idées d'intérêt personnel, donneront une définition claire et précise du blocus effectif. (Du Blocus Maritime, pp. 110, 111.)

Wharton says in regard to blockades:

A blockade to be effective need not be perfect. It is not necessary that the beleaguered port should be hermetically sealed. It is not enough to make the blockade ineffective that on some particularly stormy night a blockade runner slid through the blockading squadron. Nor is it enough that through some exceptional and rare negligence of the officers of one of the blockading vessels a blockade runner was allowed to pass when perfect vigilance could have arrested him. But if the blockade is not in the main effective—if it can be easily eluded—if escaping its toils is due not to casus or some rare and exceptional negligence, but to a general laxity or want of efficiency—then such blockade is not valid. (Commentaries American Law, section 233.)

The United States has entered into several treaty agreements in regard to blockade. Among those still in force are the following:

Article XIII of the treaty with Prussia, May 1, 1828, declares:

Considering the remoteness of the respective countries of the two high contracting parties and the uncertainty resulting therefrom with respect to the various events which may take place, it is agreed that a merchant vessel belonging to either of them which may be bound to a port supposed at the time of its departure to be blockaded shall not, however, be captured or condemned for having attempted a first time to enter said port, unless it can be proved that said vessel could and ought to have learned during its voyage that the blockade of the place in question still continued. But all vessels which, after having been warned off once, shall, during the same voyage, attempt a second time to enter the same blockaded port during the continuance of the said blockade, shall then subject themselves to be detained and condemned.

This article also occurs in the treaty with Sweden-Norway, July 4, 1827.

The treaty with Italy of February 26, 1871, Article XIV, states:

> And whereas it frequently happens that vessels sail for a port or a place belonging to an enemy without knowing that the same is besieged, blockaded, or invested, it is agreed that every vessel so circumstanced may be turned away from such port or place, but shall not be detained, nor shall any part of her cargo, if not contraband of war, be confiscated, unless, after a warning of such blockade or investment from an officer commanding a vessel of the blockading forces, by an indorsement of such officer on the papers of the vessel, mentioning the date and the latitude and longitude where such indorsement was made, she shall again attempt to enter; but she shall be permitted to go to any other port or place she shall think proper. Nor shall any vessel of either that may have entered into such a port before the same was actually besieged, blockaded, or invested by the other be restrained from quitting such place with her cargo, nor, if found therein after the reduction and surrender, shall such vessel or her cargo be liable to confiscation, but they shall be restored to the owners thereof; and if any vessel having thus entered any port before the blockade took place, shall take on board a cargo after the blockade be established, she shall be subject to being warned by the blockading forces to return to the port blockaded and discharge the said cargo, and if after receiving the said warning the vessel shall persist in going out with the cargo, she shall be liable to the same consequences as a vessel attempting to enter a blockaded port after being warned off by the blockading forces.

This article, omitting "by an indorsement of such officer on the papers of the vessel, mentioning the date and the latitude and longitude where such indorsement was made," appears in the treaty with Brazil of December 12, 1828.

Article 21 of the Japanese regulations relating to capture at sea of March 7, 1904, states that—

> Blockade is to close an enemy's port, bay, or coast with force, and is effective when the force is strong enough to threaten any vessels that attempt to go in or out of the blockaded port or bay or to approach the blockaded coast.

Conclusion.—In regard to the question, "Should the provisions of the Declaration of Paris of 1856 be revised?" it may be said that the first clause, "Privateering is and

remains abolished" should be maintained. Regulations should be made, however, for the control of vessels such as those of the auxiliary navy.

In case regulations in regard to the exemption from capture of private property at sea in time of war are adopted the second and third articles, "The neutral flag covers enemy's goods, with the exception of contraband of war," and "Neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag," should be modified in such a manner as to coincide therewith.

The fourth clause, "Blockades, in order to be binding, must be effective—that is to say, maintained by a sufficient force really to prevent access to the coast of the enemy," should receive new statement showing exactly what is meant and to what situations it applies, particularly what constitutes an effective blockade.

Pacific blockades will not affect powers not parties to them. (International Law Situations, 1902, Situation VII, pp. 75–83.)

In fine, the Declaration which is still binding on the signatory powers might well be subject to full consideration, and should before general acceptance be revised.

Topic VII.

A. At the convention at The Hague in 1899 three declarations were made as follows:

1. To prohibit the launching of projectiles and explosives from balloons or by other similar new methods.

2. To prohibit the use of projectiles, the only object of which is the diffusion of asphyxiating or deleterious gases.

3. To prohibit the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope, of which the envelope does not entirely cover the core, or is pierced with incisions.

(1) The first of the above declarations was ratified for a period of five years by the United States. Should the prohibition be renewed?

(2) Should the second declaration be adopted?

(3) Should the third declaration be adopted?

B. It was also voted that—

The conference expresses the wish that the questions with regard to rifles and naval guns, as considered by it, may be studied by the Governments with the object of coming to an agreement respecting the employment of new types and calibers.

What action should be taken upon this provision?

C. It was also voted that—

The conference expresses the wish that the proposal to settle the question of the bombardment of ports, towns, and villages by a naval force may be referred to a subsequent conference for consideration.

What regulations should be made in regard to bombardment?

CONCLUSION.

A. The following action should be taken on the three declarations of the convention at The Hague, 1899:

(1) The contracting powers agree to prohibit, for a term of five years, the launching of projectiles and explosives

from free balloons, or by other new methods of similar nature.

The present declaration is only binding on the contracting powers in case of war between two or more of them.

It shall cease to be binding from the time when in a war between the contracting powers one of the belligerents is joined by a noncontracting power.

(2) The nature and phrasing of the second declaration seems to be such as to make its adoption in the present form inexpedient.

(3) The third declaration should be made to conform to the principle embodied in the Laws and Customs of War on Land.

B. Discussion and study of the question of restriction upon invention and use of new types and calibers of guns subsequent to the conference in 1899 seems to show that such action would not necessarily lessen the burden of war, shorten its duration, or make it more humane. This being the opinion which seems to accord with the facts, it does not seem logical to impose any restriction, and such a limitation should not be adopted.

C. The bombardment, by a naval force, of unfortified and undefended towns, villages, or buildings is forbidden, though such towns, villages, or buildings are liable to the damages incident to the destruction of military or naval establishments, public depots of munitions of war, or vessels of war in port, and such towns, villages, or buildings are liable to bombardment when reasonable requisitions for provisions and supplies at the time essential to the naval force are withheld, in which case due notice of bombardment shall be given.

Steps should be taken to spare, as far as possible, edifices devoted to religion, art, science, and charity, hospitals and places where the sick and wounded are collected, provided they are not used at the same time for military purposes. The besieged should indicate these buildings or places by some particular and visible signs, which should previously be notified to the assailants.

DISCUSSION AND NOTES.

General.—Of the three declarations, the first received an unanimous affirmative vote. The second was opposed by Captain Mahan, representing the United States. The third was opposed by Great Britain and the United States, while Portugal abstained from voting.

History shows that it has been customary to put any new means of war under the ban for a time. At one time early in the twelfth century the Lateran Council denounced the crossbow. Later, those who used gun powder were denied quarter. The bayonet was looked upon as a barbarous instrument. Such means of warfare are no longer prohibited.

The use of poisoned bullets or weapons, the use of small explosive bullets (less than 400 grammes), and the use of arms and projectiles which cause unnecessary suffering are, however, prohibited.

The object of war is peace. The use of barbarous methods, the practice of treachery, and the unnecessary aggravation of suffering tends rather to prolong the war than to hasten peace. Instruments of war are not unlawful because they entail suffering, but because the suffering entailed bears no proportionate relation to the attainment of the end of war, viz, the bringing of the enemy to terms of surrender.

In Maine's International Law, being lectures delivered in 1887, there is a summary mentioning the attitude toward new inventions for warlike purposes. He says that—

> One of the most curious passages of the history of armament is the strong detestation which certain inventions of warlike implements have in all centuries provoked, and the repeated attempts to throw them out of use by denying quarter to the soldiers who use them. The most unpopular and detested of weapons was once the crossbow, which was really a very ingenious scientific invention. The crossbow had an anathema put on it, in 1139, by the Lateran Council, which anathematized *artem illam mortifera et Deo odibilem.* The anathema was not without effect. Many princes ceased to give the crossbow to their soldiers, and it is said that our Richard I revived its use with the result that his death by a crossbow bolt was regarded by a great part of Europe as a judgment. It seems quite certain that the con-

demnation of the weapon by the Lateran Council had much to do with the continued English employment of the older weapon, the longbow, and thus the English successes in the war with France. But both crossbow and longbow were before long driven out of employment by the musket, which is in reality a smaller and much improved form of the cannon that at an earlier date were used against fortified walls. During two or three centuries all musketeers were most severely, and as we should now think most unjustly, treated. The Chevalier Bayard thanked God in his last days that he had ordered all musketeers who fell into his hands to be slain without mercy. He states expressly that he held the introduction of firearms to be an unfair innovation on the rules of lawful war. Red-hot shot was also at first objected to, but it was long doubtful whether infantry soldiers carrying the musket were entitled to quarter. Marshal Mont Luc, who has left Memoirs behind him, expressly declares that it was the usage of his day that no musketeer should be spared (p. 138).

A (1). The use of balloons.—At The Hague in 1899 the following declaration was made:

> To prohibit the launching of projectiles and explosives from balloons or by other similar methods.

This prohibition was adopted by the United States for a period of five years. The vote of the Hague committee was at first for perpetual prohibition of this method of conducting hostilities, but it was limited to five years.

The use of balloons was by this declaration prohibited only in case of "launching of projectiles and explosives." It was admitted that it was allowed for certain purposes by Article 29 of the Second Convention, which, speaking of those who shall not be treated as spies, says:

> To this class belong likewise individuals sent in balloons to deliver dispatches and generally maintain communication between the various parts of an army or territory.

This position in regard to balloons is a decided step in advance from that taken by Prussia in 1870. Bismarck maintained that an Englishman would properly be subject to arrest and trial by court-martial "because he had spied out and crossed our outposts and positions in a manner which was beyond the control of the outposts, possibly with a view to make use of the information thus gained to our prejudice." Though persons captured from balloons were severely treated and imprisoned, none were executed

as spies, though some were condemned to death. (Parliamentary Papers, LXXII, 1871.)

Such persons as go in balloons lack the essential elements of spies, i. e., "acting secretly or under false pretenses." Persons in balloons can not, if they would, act secretly or under false pretenses. They are in full view. To such persons is now conceded the status of prisoners of war, and the making of observations by means of balloons is as legitimate as any other warlike operation.

There arise, however, certain questions in regard to the control of the use of balloons because of the increasing development of this means of locomotion.

It is reported that of the 64 balloons sent up from Paris in 1870–71 two were lost at sea, five were taken by the enemy, and the remainder accomplished in some degree their mission. Such a result of the use of balloons would warrant the continuance of their use.

The use of balloons has has been most commonly for purposes of observation and the carriage of dispatches. With the further development of wireless telegraphy, it may be possible that the usefulness of balloons may be extended as means for transmitting and receiving messages. It is also stated that the movements of submarine boats may be detected at a greater depth from the balloon. Whatever may be the fact in such cases, it is practically provided for in the regulation adopted for warfare on land, which admits such uses and regards the persons engaged in such operations, if captured, as prisoners of war, and not as spies. In fact, such a use of balloons is regarded as a legitimate act of war.

The sole question, then, is in regard to the use of balloons or similar methods as means for the launching of projectiles and explosives.

Holls in The Peace Conference at The Hague (p. 95) says of the action of the committee having the matter in charge:

> On the subject of balloons the subcommittee first voted a perpetual prohibition of their use, or that of similar new machines for throwing projectiles or explosives. In the full committee, on motion of Captain Crozier, the prohibition was unanimously limited to cover a period of five years only. The action taken was for humanitarian reasons

alone, and was founded upon the opinion that balloons, as they now exist, form so uncertain a means of injury that they can not be used with accuracy. The persons or objects injured by throwing explosives may be entirely disconnected from the conflict, and such that their injury or destruction would be of no practical advantage to the party making use of the machines. The limitation of the prohibition to five years' duration preserves liberty of action under such changed circumstances as may be produced by the progress of invention.

In speaking of the proposition to restrict the period which the regulation in regard to the launching of projectiles from balloons should run, Captain Crozier said that he had originally voted for the regulation without limitation of time. He showed that the subcommittee had manifested a spirit of tolerance in regard to those methods tending to increase the efficacy of the means of carrying on war and a spirit of restricting of those methods which, without being necessary from the point of view of efficacy, seem to cause unnecessary suffering. No limit had been imposed on the perfecting of artillery, powder, explosives, and guns. Explosive bullets had been prohibited altogether, as had the launching of projectiles from balloons. His general conclusion was that it was the purpose to preserve efficacy at the risk even of increasing suffering if that was indispensable.

Captain Crozier admitted that the restriction on explosive bullets was a limitation which would be in the direction of a lessening of the suffering of war. It seemed difficult to him to justify, by humanitarian motives, the employment of balloons for the launching of projectiles and explosives. The lack of practical knowledge in regard to the possible use of balloons and the possible development of control through new inventions made uncertain the consequences of the use of this agency in war. It might be so developed as to make it the deciding factor in a critical moment of a conflict by concentrating the destruction of life and property in such a way as to bring to an end a struggle that otherwise must be long continued. (Conference Internationale de la Paix, 2^{e} Partie, p. 75.) The possibilities of the development may be such as to make its use for launching projectiles and explosives a most economic and humane means of warfare. If all or many of the

possibilities which some think reside in the balloon are realized, it certainly should not be a prohibited means of warfare, because it may lessen, rather than increase, the sufferings incident to war. The use of the balloon or other means of aerial navigation for launching projectiles or explosives should therefore not be permanently prohibited.

Many of the objections which have been urged against balloon warfare have been urged against torpedoes, mines, etc. It is admitted also that at the present time balloons are not fully dirigible. Their motion is uncertain. The point at which projectiles or explosives launched from a balloon may fall is uncertain. Injury might be done to noncombatants when aimed at combatants. The limited weight of the projectile or explosives which a balloon might carry is not a serious practical objection that might not be overcome. Yet there are too many objections to allow the unrestricted use of balloons and other similar new methods of launching projectiles and explosives until the means of aerial navigation are under reasonable control, and only when under control should they be thus used. This is a demand which neutrals and noncombatants may properly make. This is a demand which on ordinary grounds of humanity may properly be made, because only when under control can the military objects sought in the use of such means be attained. How long it will be before the means of aerial navigation are developed to a degree which will give a reasonable control can not be known at present. That they may sometime be thus developed is not improbable. This being the case, while there should not be a permanent prohibition, there should be a temporary prohibition of the "launching of projectiles and explosives from balloons and other similar new methods."

The length of time for which the prohibition should run may conveniently be made five years, as this gives a reasonable period for development.

This will also give time for the development of rules for the government of the use of this agency. Such rules have already received consideration and discussion, and

could well be left to an internationl committee for formulation. (Fauchille, Le Domaine Aérien et le Régime Juridique des Aerostats, Paris, 1901; Annuaire de l'Institut de Droit International, 1902, p. 19; Nys, Droit International, I, p. 523.)

The objections raised against the use of balloons apply to "free balloons" and not to "anchored balloons." The "anchored balloons" are under control. These are not, therefore, subject to the restrictions applicable to the "free balloon," but remain as it were a part of the territory of the belligerent controlling the place of anchorage. The limitation to free balloons should be made in the rule.

In the discussion of this topic by the Naval War College in 1903 the conclusion was reached that—

> The reasons that applied at the time of the peace conference are equally valid at the present time, therefore the article * * * from present indications should be renewed. (International Law Discussions, 1903, p. 23.)

To this may well be added "for a term of five years from the date of said agreement."

Conclusion.—The article would, according to the above discussions, read as follows:

> The contracting powers agree to prohibit, for a term of five years, the launching of projectiles and explosives from free balloons or by other new methods of similar nature.
>
> The present declaration is only binding on the contracting powers in case of war between two or more of them.
>
> It shall cease to be binding from the time when in a war between the contracting powers one of the belligerents is joined by a noncontracting power.

A (*2*) *Projectiles diffusing gases.*—The discussion of the prohibition of the use of projectiles, the only object of which is the diffusion of asphyxiating or deleterious gases, showed support of the proposition on various grounds. The proposition was first brought forward by Captain Schéine in behalf of the Russian Government. The form of the proposition was at first to generally prohibit projectiles which diffuse asphyxiating and deleterious gases, but was subsequently made to apply not to projectiles which *might* on explosion produce gases as an incident of

explosion but to those projectiles only whose sole object was the diffusion of asphyxiating and deleterious gases. Captain Mahan, early in the discussion, maintained that such a means of warfare was more humane than such a means as dismembered or lacerated the body; that the use of such projectiles involved no cruelty or bad faith, and that their use should be a legitimate means of warfare. Others maintained that the use of such projectiles would poison the air in a manner analogous to the poisoning of the water supply which had long been prohibited as a means of carrying on war. Some maintained that such a method of carrying on war would be barbarous and more cruel than the use of bullets. It was generally admitted that no projectile of the nature prohibited had thus far been tested, nor was it certain that a projectile whose sole use would be the diffusion of gases would be produced. Doubtless some of the discussion was aimed against the use of lyddite, which does not seem to have justified the expectations raised in regard to its use. Nor is its use solely for the diffusion of gases, but more strictly as an explosive in recent wars, and the diffusion of gases has been simply incidental to the explosion.

In his report on the conference at The Hague, Captain Mahan states the position which he took on the use of projectiles the sole purpose of which is the diffusion of asphyxiating and deleterious gases. He says:

As a certain disposition has been observed to attach odium to the view adopted by this commission in this matter, it seems proper to state, fully and explicitly, for the information of the Government, that on the first occasion of the subject arising in subcommittee, and subsequently at various times in full committee and before the conference, the United States naval delegate did not cast his vote silently, but gave the reasons, which at his demand were inserted in the reports of the day's proceedings. These reasons were, briefly: 1. That no shell emitting such gases is as yet in practical use, or has undergone adequate experiment, consequently a vote taken now would be taken in ignorance of the facts as to whether the results would be of a decisive character, or whether injury in excess of that necessary to attain the end of warfare—the immediate disabling of the enemy—would be inflicted. 2. That the reproach of cruelty and perfidy, addressed against these supposed shells, was equally uttered formerly against firearms and torpedoes, both of which are now employed without

scruple. Until we knew the effects of such asphyxiating shells there was no saying whether they would be more or less merciful than missiles now permitted. 3. That it was illogical and not demonstrably humane to be tender about asphyxiating men with gas, when all were prepared to admit that it was allowable to blow the bottom out of an ironclad at midnight, throwing four or five hundred into the sea, to be choked by water, with scarcely the remotest chance to escape. If, and when, a shell emitting asphyxiating gases alone has been successfully produced, then, and not before, men will be able to vote intelligently on the subject. (Holls, Peace Conference at The Hague, p. 494.)

The proposition aiming to prohibit the employment of projectiles the only object of which is the diffusion of asphyxiating or deleterious gases was made with a view to avert unnecessary suffering in war. The uncertainty of the results of the use of such means was sufficient to condemn it in the eyes of many, yet the possibilities of the development of projectiles having this diffusion of gases as a partial object is not limited, as the declaration is aimed at projectiles whose sole object is the diffusion of gases. It is held that this prohibition would not apply to lyddite and certain other new explosives because the diffusion of gases is incidental. The prohibition hardly seems as was contended by the United States representatives sufficiently comprehensive. It may even happen as has been suggested that this prohibition may lead to the exclusion of some humane means of warfare.

The nature and phrasing of the second declaration seems to be such as to make its adoption in the present form inexpedient.

A (*3*) *Explosive bullets.*—The third declaration "to prohibit the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope, of which the envelope does not entirely cover the core, or is pierced with incisions," was directed particularly against the "dum-dum" bullet which had been used by British soldiers. When the above prohibition was discussed the British representative stated that in a war with a civilized State a soldier hit by a small projectile would be sufficiently wounded to check his advance. He claimed that it was otherwise

with the savage who in war even though he had been hit two or three times. Sir John Ardagh said:

> The savage continues to advance, and before one has had time to explain to him that it is in flagrant violation of the decisions of the conference at The Hague he cuts off one's head.

It was from such reasons that the British delegate contended that the projectile should be of such a character as to accomplish its purpose, i. e., to render the enemy *hors de combat*. Some maintained that the use of a bullet which expanded or flattened on entering the human body was practically the use of an explosive bullet in contravention of the declaration of St. Petersburg of 1868. It was maintained that the argument for the "dumdum" bullet was, in effect, an argument for a larger bullet merely.

As Captain Crozier, of the United States commission, reports:

> This subject gave rise to more active debate and to more decided differences of view than any other considered by the subcommittee. A formula was adopted as follows: "The use of bullets which expand or flatten easily in the human body, such as jacketed bullets of which the jacket does not entirely cover the core or has incisions in it, should be forbidden."
>
> When this subject came up in the full committee the British representative, Maj. Gen. Sir John Ardagh, made a declaration of the position of his Government on the subject, in which he described their "dumdum" bullet as one having a very small portion of the jacket removed from the point so as to leave uncovered a portion of the core of about the size of a pin head. He said that this bullet did not expand in such manner as to produce wounds of exceptional cruelty, but that on the contrary the wounds produced by it were in general less severe than those produced by the Snider, Martini-Henry, and other rifles of the period immediately preceding that of the adoption of the present small bore. He ascribed the bad reputation of the "dumdum" bullet to some experiments made at Tübingen, in Germany, with a bullet from the forward part of which the jacket to a distance of more than a diameter was removed. The wounds produced by this bullet were of a frightful character, and the bullets being generally supposed to be similar to "dumdum" in construction had probably given rise to the unfounded prejudice against the latter.
>
> The United States representative here for the first time took part in the discussion, advocating the abandonment of the attempt to cover the principle of prohibition of bullets producing unnecessarily cruel wounds by the specification of details of construction of the bullet, and proposing the following formula:

"The use of bullets which inflict wounds of useless cruelty, such as explosive bullets, and in general every kind of bullet which exceeds the limit necessary for placing a man immediately *hors de combat*, should be forbidden."

The committee, however, adhered to the original proposition, which it voted without acting on the substitute submitted.

The action of the committee having left in an unsatisfactory state the record, which thus stated that the United States had pronounced against a proposition of humanitarian intent, without indicating that our Government not only stood ready to support, but also proposed by its representative a formula which was believed to meet the requirements of humanity much better than the one adopted by the committee, the United States delegate, with the approval of the commission and in its name, proposed to the conference at its next full session the above-mentioned formula as an amendment to the one submitted to the conference by the first committee. In presenting the amendment he stated the objections to the committee's proposition to be the following: First, that it forbade the use of expanding bullets, notwithstanding the possibility that they might be made to expand in such regular manner as to assume simply the form of a larger caliber, which property it might be necessary to take advantage of, if it should in the future be found desirable to adopt a musket of very much smaller caliber than any now actually in use. Second, that by thus prohibiting what might be the most humane method of increasing the shocking power of a bullet and limiting the prohibition to expanding and flattening bullets, it might lead to the adoption of one of much more cruel character than that prohibited. Third, that it condemned by designed implication, without the introduction of any evidence against it, the use of a bullet actually employed by the army of a civilized nation.

I was careful not to defend this bullet, of which I stated that I had no knowledge other than that derived from the representations of the delegate of the power using it, and also to state that the United States had no intention of using any bullet of the prohibited class, being entirely satisfied with the one now employed, which is of the same class as are those in common use.

The original proposition was, however, maintained by the conference, the only negative votes being those of Great Britain and the United States. (Holls. Peace Conference at The Hague, p. 511.)

Professor Holland, in speaking on "Some lessons of the peace conference" (Fortnightly Review, vol. 72 (1899), p. 956), says:

Any general renunciation either of particular means of weakening an enemy, e. g., by capture of private property at sea, or of the employment against him of particular kinds of weapons, e. g., the "dumdum"

bullets, or any other novelty likely to be suggested by the progress of invention, is sure to meet with opposition, on the ground that such renunciation would unfairly affect nations which are compelled by their circumstances to rely especially on one or other of the practices which it is proposed thus to stigmatize. Nothing can be effectually prohibited which does not either cause suffering beyond the necessities of the case or conflict too seriously with the interests of neutrals.

Conclusion.—The third declaration prohibits "the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope, of which the envelope does not entirely cover the core, or is pierced by incisions." The specific nature of this prohibition was pointed out by the representatives of the United States at The Hague conference. It is not certain that another form of bullet producing similar results, but not of the prohibited class, may not be invented. This at most is only one of a general category of bullets which it is well to prohibit, i. e., the class which produces unnecessary suffering. It would therefore seem better to aim at the general category in the prohibition rather than at one variety of bullet.

It would seem expedient that this third declaration should not be adopted. At the same time, some regulation should be adopted.

Many of the objections which apply to the second declaration in regard to asphyxiating gases apply to the expansive bullets. These objections apply, or may apply, to other agencies which may later be invented for or turned to warlike uses. The object of both declarations is to prevent unnecessary physical suffering and injury without lessening the efficacy of warlike measures. Such an aim is to be favored from all points of view, and is in full accord with the objects of war. Such being the case, a general prohibition should be adopted under which specific cases could be brought. Such a provision has been inserted in the Laws and Customs of War on Land, adopted by the conference at The Hague, by which it is prohibited "to employ arms, projectiles, or material of a nature to cause superfluous suffering." Specifications under such a prohibition could be made if thought advisable, e.g., there might be added an illustrative clause, "such as explosive or expanding bullets, projectiles whose sole object is the dif-

fusion of asphyxiating and deleterious gases, etc., or other agencies which cause suffering disproportionate to the military ends to be gained by their use."

The third declaration should accordingly be made to conform to the principle embodied in the Laws and Customs of War on Land.

B. *New types of guns.*—It was voted that "the conference expresses the wish that the questions with regard to rifles and naval guns, as considered by it, may be studied by the Governments with the object of coming to an agreement respecting the employment of new types and calibers."

The consideration of the limitation of the use of new types and calibers of guns received much attention at the conference. On the matter there was a wide divergence of opinion. There was also a proposition looking to the limitation of the use of new kinds of powder and explosive materials. The reasons given in support of these propositions varied, but economy was frequently mentioned. It was shown, however, that often the reason for the adoption of a new explosive or type of gun was primarily one of economy. Propositions to limit the weight of gun, the caliber, the weight of the bullet, the initial velocity, the number of shots per minute, and the nature of the projectile were discussed. These limitations were to run for a period of five years if adopted.

The question was asked as to whether if the limitation of cannons to the type of the most perfect then in use would be understood to mean a limitation making it possible for the less advanced states to place themselves on a level with the more advanced. It was shown that this would introduce a difficulty in the way of obtaining evidence as to what form of cannon of those at the time in use was the best. Indeed, the state having such cannon would hardly care to give evidence of the fact and to disclose its points of excellence. The result of the discussion showed an unfavorable opinion on the part of the larger states, while Russia and several of the minor states favored the limitation.

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In regard to the use of new kinds of powder, the discussion, in which Captain Crozier took a leading part, showed that a limitation was not practicable and might not be humane or economic. No state favored this restriction.

Conclusion.—Discussion and study of the question of restriction upon invention and use of new types and calibers of guns subsequent to the conference in 1899 seems to show that such action would not necessarily lessen the burden of war, shorten its duration, or make it more humane. This being the opinion, which seems to accord with the facts, it does not seem logical to impose any restriction and such a limitation should not be adopted.

It may be further said that if adopted the practical difficulties of carrying into effect such a regulation would probably be almost insurmountable.

C. Bombardment of open towns.—At The Hague conference in 1899 it was voted that—

> The conference expresses the wish that the proposal to settle the question of the bombardment of ports, towns, and villages by a naval force may be referred to a subsequent conference for consideration.

This subject was quite fully discussed by the Naval War College in 1901 and 1903. (International Law Situations, 1901, pp. 5–37; International Law Discussions, 1903, pp. 23–27.)

Conclusion.—In accord with those discussions the following regulation seems advisable:

> The bombardment by a naval force of unfortified and undefended towns, villages, or buildings is forbidden, though such towns, villages, or buildings are liable to the damages incident to the destruction of military or naval establishments, public depots of munitions of war, or vessels of war in port; and such towns, villages, or buildings are liable to bombardment when reasonable requisitions for provisions and supplies at the time essential to the naval force are withheld, in which case due notice of bombardment shall be given.
>
> Steps should be taken to spare, as far as possible, edifices devoted to religion, art, science, and charity, hospitals and places where the sick and wounded are collected, provided they are not used at the same time for military purposes. The besieged should indicate these buildings or places by some particular and visible signs, which should previously be notified to the assailants.

Topic VIII.

It has been proposed to regulate the use of mines and similar agencies in maritime warfare. What, if any, should be the regulations?

CONCLUSION.

1. Unanchored contact mines are prohibited, except those that by construction are rendered innocuous after a limited time, certainly before passing outside the area of immediate belligerent activities.

2. Anchored contact mines that do not become innocuous on getting adrift are prohibited.

3. If anchored contact mines be used within belligerent jurisdiction or within the area of immediate belligerent activities, due precaution shall be taken for the safety of neutrals.

DISCUSSION AND NOTES.

Certain questions.—The use of mines in maritime warfare gives rise to several questions.

1. There is the general question as to whether the use of mines is in any case allowable.

2. If allowable, there arise special questions as to (*a*) character of permitted mines, (*b*) area of permitted use, (*c*) purpose of permitted use.

1. *Use of mines in general.*—The question as to whether the use of mines is in any case allowable is one which has been discussed in a manner similar to that of the discussion of the use of torpedoes at an earlier date. The discussion resulted in the recognition of the use of torpedoes as a legitimate means of warfare so soon as this means of warfare was under reasonable control of the military

forces using it. Torpedoes are now considered legitimate means of warfare. None of the conventions and conferences have endeavored to prohibit the use of torpedoes or mines. It has been recognized that both mines and torpedoes are legitimate means of warfare in recent wars, and both agencies have been used. This, however, has been recognized only so far as the belligerents are concerned. It may be affirmed that the use of mines is a legitimate means of hostilities as between belligerents.

This position does not, however, imply that mines may be used at will without regard to those not concerned in the war. As the torpedo and certain other means of hostilities are necessarily directed and dispatched by the belligerent and are under belligerent control to this extent, the probable range of their destructive activity can be reasonably known.

Certain mines, however, are not thus under control and their probable action may not be predicted or directed. The claim seems to be reasonable that agenies so destructive as mines shall be restricted in such manner as to affect solely the belligerents concerned in the hostilities.

2. *Limitations on use of mines.*—The questions then arise as to the special restrictions upon the use of mines.

(1) Should the character of the mines be limited? In general mines may be exploded at a fixed time by a mechanical arrangement, may be exploded at any time when controlled by shore or other connections, or may be exploded by contact with a vessel passing over the mine.

Of these mines, those which are regulated to explode at a time fixed by a belligerent and those whose explosion is at the will of the belligerent operating the mine from the shore or otherwise, may be said to be open to little or no objection.

Contact mines—those which explode on coming in contact with a vessel—may, however, be anchored or free. Contact mines which are anchored are dangerous to navigation, and make it necessary that their field at all times be so guarded as not to be a menace to parties not concerned in the hostilities. This may be done in various ways, as by prohibiting the entrance of neutrals within certain

areas, piloting neutrals through the mined areas, etc. Thus anchored, contact mines may be said to be negatively under control of the belligerent locating them and little objection can be raised to their use, provided they are in fact thus controlled, and there seems to be no reason why anchored contact mines may not at all times be under this measure of negative control. Mechanical construction may be such that if an anchored mine gets adrift through action of tides, winds, or otherwise it may from that moment be rendered harmless as a mine. It may be predicted that a certain per cent of mines will, under ordinary circumstances, get adrift. This being the case, contact anchored mines should so be constructed as to render them harmless on becoming adrift. With this limitation on the use of anchored contact mines there seems to be little objection to these mines when the field is properly guarded, so far as its use by innocent vessels is concerned.

There remains the class of mines which come in the category of unanchored contact mines, i. e., mines which are carried by the currents and explode on contact with a vessel or other object. Such mines are not within the control of the party launching them, are liable to inflict damage upon any vessel coming in contact with them, may injure noncombatant, combatant, or neutral alike; may, and probably will, do injury out of proportion to any possible military advantage that can be secured by their use. Their use is not a military necessity. It may be reasonable, therefore, to conclude that unanchored contact mines should be restricted in their use.

(2) The area in which unanchored contact mines can be used has recently been discussed in the public press, particularly because during the Russo-Japanese war there were reports, which have not been substantiated, that unanchored mines were intentionally or accidentally adrift on the high seas in the neighborhood of Port Arthur.

The high seas being *res nullius*, neither belligerent has a right to render passage over the high seas unnecessarily hazardous. It is generally admitted that neutrals and noncombatants enter the field of actual hostile operations at their own risk. This field is usually evident from the pres-

ence of belligerent vessels or otherwise. The presence of unanchored contact mines is, however, not an evident but a hidden peril, and the danger consists, to a considerable extent, in the hidden nature. Mines of this character are not within control of the belligerent. The lack of control, the hidden nature of the peril to third parties, the inadequate military necessity, and the great danger from the use of these mines would be ample reasons for the prohibition of the use of unanchored and uncontrolled mines in the high seas.

The use of unanchored contact mines within the three-mile limit has received some consideration. The objections raised against the unanchored contact mine on the high seas prevail in large measure against similar mines within the maritime jurisdiction of the belligerent. It is considered that the advantage to be gained from the use of such uncertain means of warfare is in no sense commensurate with the possible and probable danger to third parties. The mines are also ordinarily beyond control when launched and subject to action of tide and winds. They may pass beyond the maritime jurisdiction and easily become a menace to maritime commerce in general. It would therefore seem advisable that the restriction upon the use of unanchored contact mines be made general, and that a proposition prohibiting the use of uncontrolled, unanchored contact mines be adopted.

Certain contact mines, though unanchored, may to some extent be controlled, as are those regulated by clockwork to sink or to become innocuous after a fixed number of minutes, after the manner of certain torpedoes. There seems little valid objection to the use of such mines within the field of active belligerent operations. In such a case the mines must be so controlled as to make the period of effectiveness so short that the mines will not during this period drift into contact with neutral vessels or come within the path of neutral vessels. Such mines would be directed toward a specific object—e. g., checking the pursuit of an enemy—and would cease to be a hidden peril before they would come in contact with a neutral vessel or pass beyond the immediate field of hostile operations.

Their use would be analogous to the use of certain torpedoes.

Of the use of mines and torpedoes Commander Von Uslar, of the German navy, has recently said:

> A further restriction of the instruments of war now admissible by international law is, for the immediate future, not necessary. It is another question whether the instruments should be employed everywhere. The safety of neutral shipping demands that on the high seas instruments of war which are a hidden danger to shipping shall be avoided. As long as this demand does not run counter to the belligerent's object—viz, to overcome his opponent quickly—it must be acceded to.
>
> Mines, stationary and drifting, as well as torpedoes without sinking appliances, are therefore to be regarded as admissible only in the territorial waters of the belligerents and in the actual operation area of the fleets. There is, however, no justification for the demand that mines shall be used to close harbors only in the case of an effective blockade. The belligerents must be permitted to employ this measure against all harbors that the adversary will possibly use as a base for his operations, on condition that they notify the neutral governments in good time. (181 North American Review, 1905, p. 184.)

When the use of unanchored contact mines is prohibited many of the main objections to the use of mines are removed. It has been suggested that the use of fire rafts or rafts or vessels loaded with explosives should be also prohibited. It has usually been held that these are not hidden dangers against which it is not possible for the neutral to guard, and that within the maritime jurisdiction of the belligerent and within the area of hostilities the neutral must take such risks as those to which the belligerent's own peaceful commerce is exposed. It might be advisable, however, to make the prohibition general, so far as rafts or vessels loaded with explosives are concerned.

A prohibition to the following effect would be desirable in each case:

The use of uncontrolled, unanchored contact mines or other similar uncontrolled agencies is prohibited.

(3) If uncontrolled, unanchored contact mines are prohibited, the next question arises as to the purpose for which other mines may be used.

Some have objected to the use of controlled mines at points outside of belligerent jurisdiction for the purpose

of preventing entrance to a belligerent territory, whether as a measure of defense or offense. Others have maintained that even a blockade of an enemy port can thus be established.

In regard to the establishment of a practical blockade by the location of fixed contact mines or other mines, it may be said that in general neutrals have a right to carry on ordinary commerce with belligerents in time of war. The risk that the blockade runner incurs is that of confiscation of ship and cargo. The officers and men are not regarded as enemies or treated as such for the simple offense of attempting to violate blockade. A blockade by mines of which a neutral has not proper warning would introduce the unallowable risk of entire destruction of ship and crew by the explosion of a hidden mine. Through the use of anchored contact mines it is conceivable that the whole coast of a country could be practically blockaded, while the blockading belligerent forces might retire and incur no risk of hostile attack. As the neutral has the right of innocent passage over the seas, the placing of fixed mines in an area not under effective control of the belligerent or not in the field of hostile operations of which a neutral would be duly advised would not be allowable. It may be even further asserted that no uncontrolled contact mines should be placed on the high seas, for it is uncertain how long such mines may be within the field of operations of the belligerent who, alone, may know their location. The regulation should therefore properly prohibit the use of uncontrolled contact mines on the high seas for the purpose of blockade or for other offensive or defensive purposes.

It is generally admitted that the belligerent jurisdiction is the proper area for hostilities. Within this area therefore there may be a greater freedom of use of mines. The sole restriction here should be that the mines should be under control positively or negatively; i. e., the belligerent should be able to control the mines in such a way that they should not imperil the neutral or the belligerent might keep the neutral from or guide him through the mined area. In other words, the use of mines should be

confined strictly to military operations and areas and the perils should not extend to innocent neutrals. Mines that are absolutely within the control of the belligerent and may be exploded or remain innocent at his will or are of such construction as not to imperil neutrals are proper means of war in the same manner as cannons or torpedoes.

Conclusion.—The general conclusion in regard to mines might be summarized as follows:

1. Unanchored contact mines are prohibited except those that by construction are rendered innocuous after a limited time, certainly before passing outside the area of immediate belligerent activities.

2. Anchored contact mines that do not become innocuous on getting adrift are prohibited.

3. If anchored contact mines be used within belligerent jurisdiction or within the area of belligerent activities, due precaution shall be taken for the safety of neutrals.

Topic IX.

What limitations should be placed on the entrance and sojourn of belligerent vessels within neutral ports?

(*a*) Of vessels of one belligerent when vessel of other is within the port?

(*b*) Of entrance and sojourn for repairs and of entrance and sojourn for supplies?

(*c*) Of entrance and sojourn to escape capture and of entrance and sojourn when defeated and damaged by the enemy?

CONCLUSION.

(*a*) The twenty-four-hour rule should be observed.

(*b*) When not entering to escape the enemy or repair damages caused by act of war, a belligerent vessel may make repairs necessary to continue the voyage in safety, and may take on such supplies as are necessary to reach the nearest port of her home country or some nearer neutral destination.

(*c*) Belligerent vessels entering a neutral port for the purpose of escaping capture or repairing damages caused by act of war, if remaining beyond twenty-four hours, are liable to be interned.

DISCUSSION AND NOTES.[a]

(*a*) *Sojourn of vessel of one belligerent when vessel of other belligerent is within the port.*—The discussion and solution at this Naval War College in 1904 of Situation V seemed to show the propriety of a regulation embodying the following principles: When vessels (whether ships of

[a] It is understood that the term "belligerent vessels" does not apply to strictly private vessels of the belligerent.

war or merchant vessels) of both belligerents are within the same port waters or roadstead in the territorial jurisdiction of a neutral, there shall be an interval of not less than twenty-four hours between the departure therefrom of any ship of one belligerent and a ship of war of the other belligerent. (See International Law Situations, Naval War College, 1904, p. 79.)

(*b*) *Entrance and sojourn for repairs and entrance and sojourn for supplies.*—The neutrality proclamation of the United States, issued February 11, 1904, in regard to the Russo-Japanese war, gives certain specific statements concerning the sojourn of belligerent vessels in ports of the United States:

And I do hereby further declare and proclaim that any frequenting and use of the waters within the territorial jurisdiction of the United States by the armed vessels of either belligerent, whether public ships or privateers, for the purpose of preparing for hostile operations or as posts of observations upon the ships of war or privateers or merchant vessels of the other belligerent lying within or about to enter the jurisdiction of the United States must be regarded as unfriendly and offensive and in violation of that neutrality which it is the determination of this Government to observe; and to the end that the hazard and inconvenience of such apprehended practices may be avoided I further proclaim and declare that from and after the 15th day of February instant, and during the continuance of the present hostilities between Japan and Russia, no ship of war or privateer of either belligerent shall be permitted to make use of any port, harbor, roadstead, or waters subject to the jurisdiction of the United States from which a vessel of the other belligerent (whether the same shall be a ship of war, a privateer, or a merchant ship) shall have previously departed until after the expiration of at least twenty-four hours from the departure of such last-mentioned vessel beyond the jurisdiction of the United States. If any ship of war or privateer of either belligerent shall, after the time this notification takes effect, enter any port, harbor, roadstead, or waters, except in case of stress of weather or of her requiring provisions or things necessary for the subsistence of her crew, or for repairs; in either of which cases the authorities of the port or of the nearest port (as the case may be) shall require her to put to sea as aoon as possible after the expiration of such period of twenty-four hours, without permitting her to take in supplies beyond what may be necessary for her immediate use; and no such vessel which may have been permitted to remain within the waters of the United States for the purpose of repair shall continue within such port, harbor, roadstead, or waters for a longer period than twenty-

four hours after her necessary repairs shall have been completed unless within such twenty-four hours a vessel, whether ship of war, privateer, or merchant ship, of the other belligerent shall have departed therefrom, in which case the time limited for the departure of such ship of war or privateer shall be extended so far as may be necessary to secure an interval of not less than twenty-four hours between such departure and that of any ship of war, privateer, or merchant ship of the other belligerent which may have previously quit the same port, harbor, roadstead, or waters.

The explicit British provisions are as follows:

Rule 1. During the continuance of the present state of war all ships of war of either belligerent are prohibited from making use of any port or roadstead in the United Kingdom, the Isle of Man, or the Channel Islands, or in any of His Majesty's colonies or foreign possessions or dependencies, or of any waters subject to the territorial jurisdiction of the British Crown, as a station or place of resort for any warlike purpose, or for the purpose of obtaining any facilities for warlike equipment; and no ship of war of either belligerent shall hereafter be permitted to leave any such port, roadstead, or waters from which any vessel of the other belligerent (whether the same shall be a ship of war or a merchant ship) shall have previously departed until after the expiration of at least twenty-four hours from the departure of such last-mentioned vessel beyond the territorial jurisdiction of His Majesty.

Rule 2. If there is now in any such port, roadstead, or waters subject to the territorial jurisdiction of the British Crown any ship of war of either belligerent, such ship of war shall leave such port, roadstead, or waters within such time, not less than twenty-four hours, as shall be reasonable, having regard to all the circumstances and the condition of such ship as to repairs, provisions, or things necessary for the subsistence of her crew; and if after the date hereof any ship of war of either belligerent shall enter any such port, roadstead, or waters subject to the territorial jurisdiction of the British Crown, such ship shall depart and put to sea within twenty-four hours after her entrance into any such port, roadstead, or waters, except in case of stress of weather, or of her requiring provisions or things necessary for the subsistence of her crew, or repairs; in either of which cases the authorities of the port or of the nearest port (as the case may be) shall require her to put to sea as soon as possible after the expiration of such period of twenty-four hours, without permitting her to take in supplies beyond what may be necessary for her immediate use; and no such vessel which may have been allowed to remain within British waters for the purpose of repair shall continue in any such port, roadstead, or waters for a longer period than twenty-four hours after her necessary repairs shall have been completed; provided, nevertheless, that in all cases in which there shall be any vessels (whether ships of war or merchant ships) of both the said belligerent parties in the same

port, roadstead, or waters within the territorial jurisdiction of His Majesty, there shall be an interval of not less than twenty-four hours between the departure therefrom of any such vessel (whether a ship of war or merchant ship) of the one belligerent and the subsequent departure therefrom of any ship of war of the other belligerent; and the time hereby limited for the departure of such ships of war, respectively, shall always, in case of necessity, be extended so far as may be requisite for giving effect to this proviso, but no further or otherwise.

RULE 3. No ship of war of either belligerent shall hereafter be permitted, while in any such port, roadstead, or waters subject to the territorial jurisdiction of His Majesty, to take in any supplies, except provisions and such other things as may be requisite for the subsistence of her crew, and except so much coal only as may be sufficient to carry such vessel to the nearest port of her own country, or to some nearer destination, and no coal shall again be supplied to any such ship of war in the same or any other port, roadstead, or waters subject to the territorial jurisdiction of His Majesty, without special permission, until after the expiration of three months from the time when such coal may have been last supplied to her within British waters as aforesaid.

RULE 4. Armed ships of either belligerent are interdicted from carrying prizes made by them into the ports, harbors, roadsteads, or waters of the United Kingdom, the Isle of Man, the Channel Islands, or any of His Majesty's colonies or possessions abroad.

Rule 3 of this British proclamation received further interpretation in the proclamation of the governor of Malta of August 12, 1904. This proclamation states that—

Whereas in giving the said order we were guided by the principle that belligerent ships of war are admitted into neutral ports in view of exigencies of life at sea and the hospitality which it is customary to extend to vessels of friendly powers;

And whereas this principle does not extend to enable belligerent ships of war to utilize neutral ports directly for the purpose of hostile operations:

We therefore, in the name of His Majesty, order and direct that the above-quoted rule No. 3, published by proclamation No. 1 of the 12th February, 1904, inasmuch as it refers to the extent of coal which may be supplied to belligerent ships of war in British ports during the present war, shall not be understood as having any application in case of belligerent fleet proceeding either to the seat of war or to any position or positions on the line of route with the object of intercepting neutral ships on suspicion of carrying contraband of war, and that such fleet shall not be permitted to make use in any way of any port, roadstead, or waters subject to the jurisdiction of His Majesty for the purpose of coaling, either directly from the shore or from colliers ac-

companying such fleet, whether vessels of such fleet present themselves to any such port or roadstead or within the said waters at the same time or successively, and, second, that the same practice shall be pursued with reference to single belligerent ships of war proceeding for purpose of belligerent operations as above defined; provided that this is not to be applied to the case of vessels putting in on account of actual distress at sea, in which case the provision of rule No. 3, as published by proclamation No. 1 of the 12th February, 1904, shall be applicable.

This interpretation of the rule No. 3 would prohibit the use of British ports for coaling for vessels proceeding to the seat of war or to any position on the line of route for intercepting neutral ships on suspicion of carrying contraband. Such a provision tends to emphasize the necessity of making a fleet self-sufficient. It can not reasonably be expected that a neutral power will permit its own ports to be used as sources of supplies and coal, using which the belligerent vessel or fleet may set forth to seize the same neutral's commerce or interrupt its trade.

The French declaration of neutrality of April 27, 1898, as follows, provided only for the limitation of the sojourn of ships of war with prizes, but did not limit the sojourn of war vessels unaccompanied by prize:

The Government decides in addition that no ship of war of either belligerent will be permitted to enter and to remain with her prizes in the harbors and anchorages of France, its colonies, and protectorates for more than twenty-four hours, except in case of forced delay or justifiable necessity.

Identical provisions were contained in instructions of the French minister of marine, issued in February, 1904, and referring to the Russo-Japanese war. There were added, however, certain explanatory clauses, as follows:

"Je crois devoir ajouter à ces regles principales quelques observations complémentaires résumant les traditions du gouvernement français: 1°. En aucun cas, un belligérant ne peut faire usage d'un port français ou appartenant à un État protégé, dans un but de guerre, ou pour s'y approvisionner d'armes ou de munitions de guerre, ou pour y exécuter, sous prétexte de réparations, des travaux ayant pour but d'augmenter sa puissance militaire: 2°. La durée du séjour dans nos ports de belligérants non accompagnés d'une prise n'a été limitée par aucune disposition spéciale. Mais pour être autorisés à y séjourner, ils sont tenus de se conformer aux conditions ordinaires de la neutralité, qui peuvent se résumer ainsi qu'il suit: a) Les bâtiments admis au

bénéfice de l'asile doivent entretenir des relations pacifiques avec tous les navires mouillés dans le même port, et, en particulier, avec les bâtiments appartenant à leurs ennemis; b) Lesdits navires ne peuvent, à l'aide de ressources puisées à terre, augmenter leur matériel de guerre, renforcer leurs équipages, ni faire des enrôlements volontaires, même parmi leurs nationaux; c) Ils doivent s'abstenir de toute enquête sur les forces, l'emplacement ou les ressources de leurs enemis, ne pas appareiller brusquement pour poursuivre ceux qui leur searient signalés, en un mot, s'abstenir de faire du lieu de leur résidence la base d'une opération quelconque contre l'ennemi; de n'employer la force ni la ruse pour recousser les prises faites par l'ennemi, ou pour délivrer des prisonniers de leur nation; 3°. Il ne peut être fourni à un belligérant que les vivres, denrées approvisionnements et moyens de réparations nécessaires à la subsistance de son équipage et à la sécurité de sa navigation; 4°. Lorsque des belligérants ou des navires de commerce des deux parties belligérantes se trouveront ensemble dans un port français, il y aura un intervalle qui ne pourra être moindre de vingt-quatre heures entre le départ de tout navire de l'un des belligérants et le départ subséquent de tout bâtiment de l'autre belligérant. Ce délai sera étendu, en cas de besoin, sur l'ordre de l'autorité maritime, autant que cela pourra être necessaire; 5°. il est interdit aux belligérants de seé livrer à aucun acte d'hostilité dans toute l'étendue des eaux territoriales. Si une violation de cette règle venait à votre connaissance, sans que vous ayez pu la prévenir, vous auriez à m'en rendre compte immédiatement, afin que le gouvernement puisse faire entendre, auprès de qui de droit, les protestations et réclamations nécessaires. Il en sera de même si des navires de commerce portant le pavillon français ou celui d'un des États protégés par la France venaient à être molestés dans l'exercice du droit de visite qui appartient aux belligérants.

The above may properly be regarded as setting forth officially the French position.

The latest statement of the French point of view as to the use of neutral waters by belligerents in time of war is given in an article by Charles Dupuis on "Maritime Responsibilities in Time of War." He says:

Whilst any act of war is forbidden in territorial waters, free passage through them is allowed, even to the belligerent war ships, as in time of peace. The area of territorial waters is not absolutely fixed for all states by international law; France admits that this area is one of three sea miles from low-water mark. Sovereign jurisdiction is exercised more strictly in ports. They are not a part of the sea routes; they are only the points of departure and arrival, the necessary intermediaries between sea and land, and, occasionally, an indispensable refuge from the perils of the sea. The riparian state should, in principle, keep its ports open in time of peace; it should always allow

access thereto to ships in time of distress. The neutral state is equally bound to give shelter to belligerent war ships which are prevented by the state of the sea, the damages they have sustained, or their want of provisions, from pursuing their journey; it may, without being bound to do so, give them shelter in any other event. France throws her ports wide open to belligerent war ships; she does not limit the length of their stay; she only limits it to twenty-four hours when they have entered the port with prizes taken from the enemy. War ships which have sought refuge in a neutral port to escape the enemy's pursuit are free to stay or to leave. If the enemy wishes to reduce them to a state of impotence, it is for him to take the necessary measures to make it dangerous for them to leave.

Belligerent war ships which have entered a French port may effect repairs there, or take in stores necessary for navigation or for the subsistence of their crews; they may not, on the other hand, recruit combatants, or provide themselves with arms, munitions, or articles for use in action. Their stay in a neutral port may, therefore, allow them to leave it with fresh means of navigation, but not with any increase of fighting strength. Nevertheless, the enjoyment of facilities of taking in stores or coal might degenerate into an abuse. If a war ship were free to return periodically to the same port in search of articles which, whilst not instruments of warfare, were yet resources indispensable to carrying on her campaign, she would be turning this harbor into an actual base of operations. Continuous resort to the same place with the object of taking in stores, thanks to the resources of the place, is the characteristic of a base of operations—that is to say, of the "point d'appui" for renewing and multiplying the most varied enterprises against the enemy.

Still, in certain cases, a neutral harbor, or a station within neutral waters, might happen to become not a base of operations but the base of a deliberate operation of a hostile character. This would be the case where a ship or squadron claimed the right to lie in wait, within the shelter of neutral waters, for the passage of a hostile force in order to attack it unexpectedly at the limits of such neutral waters. French orders issued in 1904 by the minister of marine forbid any preparation of hostile acts or operations, even of an isolated nature, being made within French waters. (North American Review, August, 1905, vol. 181, p. 182.)

A neutral may properly limit or prohibit the sojourn within its ports of a belligerent vessel which seeks to repair damages caused by war. It may properly admit a vessel seeking to repair damages caused by action of the elements. Such repairs should be confined to making the vessel seaworthy.

A belligerent vessel may take on supplies necessary to reach her nearest home port or some nearer destination,

She may not, however, take on military stores or ammunition. This may be held to apply, according to the British interpretation, to the restriction of the supply of coal to that which is to be used for the purpose of navigation only and not for action against belligerents or for pursuit of contraband.

(*c*) Of entrance and sojourn to escape capture and of entrance and sojourn when defeated and damaged by the enemy?

Situation V, considered by this Naval War College in the summer of 1904, bore upon this subject.

The situation as proposed was as follows:

While war exists between the United States and State X a number of the war vessels of State X are pursued by a United States fleet and seek refuge in a port of State Y, a neutral. The commander of the United States fleet, after waiting outside the port for twenty-four hours, protests to the authorities of State Y, claiming that as the vessels of the enemy have entered the neutral port to escape his fleet they may not justly be sheltered longer.

(*a*) Is the position taken by the United States commander correct?

(*b*) What should the authorities of State Y do?

The conclusion was as follows:

(*a*) From the point of view of both theory and practice it would seem that the United States commander, under the circumstances as stated in the situation, would be justified in claiming that belligerent vessels entering and remaining in the neutral port in order to escape capture by his vessels, should be interned for the remaining period of the war.

(*b*) The authorities of State Y would also be under obligations to intern the vessels of State X thus seeking neutral protection.

Speaking of asylum to naval forces, Hall says:

Marine warfare so far differs from hostilities on land that the forces of a belligerent may enter neutral territory without being under stress from their enemy. Partly as a consequence of the habit of freely admitting foreign public ships of war belonging to friendly powers to the ports of a State as a matter of courtesy, partly because of the inevitable conditions of navigation, it is not the custom to apply the same rigor of precaution to naval as to military forces. A vessel of war may enter and stay in a neutral harbor without special reasons; she is not disarmed on taking refuge after defeat; she may obtain such repair as will enable her to continue her voyage in safety; she may take in such provisions as she needs, and, if a steamer, she may fill up

with enough coal to enable her to reach the nearest port of her own country; nor is there anything to prevent her from enjoying the security of neutral waters for so long as may seem good to her. To disable a vessel, or to render her permanently immovable, is to assist her enemy; to put her in a condition to undertake offensive operations is to aid her country in its war. The principle is obvious; its application is susceptible of much variation; and in the treatment of ships, as in all other matters in which the neutral holds his delicate scale between two belligerents, a tendency toward the enforcement of a harsher rule becomes more defined with each successive war. (International Law, 5th ed., p. 626.)

The tendency toward the establishment of a definite rule has certainly become evident. The practice of dismantling and internment has been clearly established during the Russo-Japanese war.

The first instance was a subject of much discussion. The Russian vessel *Mandjur*, which entered the port of Shanghai about the middle of February in 1904, was, after considerable exchange of notes, interned to the satisfaction of Japan at the end of March. Parts of the machinery were removed and the vessel was disarmed. In August, 1904, the Russian vessels *Askold* and *Grosvoi*, which had sought refuge in the same port, were dismantled and the crew interned. About the same time the *Tsarevitch* and some smaller vessels sought refuge in the German jurisdiction at Kiaochow. These vessels were similarly treated. The Russian cruiser *Diana*, which had escaped in the same battle, sought refuge in the French port of Saigon, and was dismantled and the crew interned on September 10, 1904.

The transport *Lena*, arriving at San Francisco on September 13, 1904, was likewise interned. The negotiations between the United States and Russia in regard to the conditions of the internment of the *Lena* are set forth in the following correspondence:

Count Cassini to Mr. Adee.

[Telegram.—Translation.]

RUSSIAN EMBASSY,
Bar Harbor, Me., September 13, 1904.

Our consul at San Francisco informs me that the Russian transport *Lena* has entered that port, the condition of her boilers and other

damages not permitting her to continue her voyage. Under these circumstances I doubt not that the *Lena* will receive from the authorities of San Francisco, and in conformity with the prescriptions of international law to which a vessel in her condition is entitled, all aid compatible with the neutrality proclaimed by the Federal Government.

I am sending Mr. Hansen to Washington to see you, and come to an understanding with you.

CASSINI.

Mr. Adee to Count Cassini.

[Telegram.]

DEPARTMENT OF STATE,
Washington, September 13, 1904.

The matter of the *Lena* at San Francisco is having the instant attention of this Department. Precise information is being sought as to the condition of the boilers, machinery, and hull of the ship and the extent and duration of the repairs needed to enable her to put to sea. It appears, so far, that very extensive repairs are asked, amounting to virtual renovation.

ALVEY A. ADEE,
Acting Secretary.

Mr. Adee to Count Cassini.

[Telegram.]

DEPARTMENT OF STATE,
Washington, September 14, 1904.

Referring to my telegram of yesterday, I have the honor to advise you that the President feels constrained to reach an immediate solution of the question whether the *Lena* shall be repaired immediately so as to put to sea or be disarmed and laid up until the close of the war. If repaired, only such bare repairs can be allowed as may be necessary for seaworthiness and for taking her back to nearest home port, and even such repairs can be permitted only on condition that they do not prove to be too extensive. If disarmed, she will be laid up at the Mare Island Navy-Yard. Inspection made by United States officers at San Francisco discloses that the repairs asked for include complete outfit of new boilers and reconstruction of engines, consuming at least four or five months, or, according to the captain's estimate, eight months, and amounting to renovation of the vessel. This can not be allowed with due regard to neutrality. An immediate answer is desired, as the matter is urgent. A decision between the two alternatives should be made, so that this Government may close the incident not later than to-morrow.

ALVEY A. ADEE,
Acting Secretary of State.

Count Cassini to Mr. Adee.

[Telegram.—Translation.]

RUSSIAN EMBASSY,
Bar Harbor, Me., September 15, 1904.

I receive this very moment your telegram of the 14th. It is materially impossible to receive an answer from St. Petersburg to-day. I beg the President to allow a delay of forty-eight hours to permit me to receive instructions from my Government.

CASSINI.

Mr. Adee to Count Cassini.

[Telegram.]

DEPARTMENT OF STATE,
Washington, September 15, 1904.

The admiral at San Francisco advises me this morning that the captain of the *Lena* writes him that the ship being unseaworthy must disarm, and asks to be allowed to make needed repairs. When the President shall have approved the conditions necessary to insure the neutralization of the *Lena* and her officers and crew until the end of the war, and to permit necessary repairs, the admiral will be instructed to cause the disarmament to be effected, whereupon I shall have pleasure in advising you further.

ALVEY A. ADEE,
Acting Secretary of State.

Mr. Adee to Count Cassini.

[Telegram.]

DEPARTMENT OF STATE,
Washington, September 15, 1904.

Referring to my telegram of this morning, I have the honor to advise you that the President has this afternoon issued an order directing that the Russian armed transport *Lena*, now at San Francisco, be taken in custody by the naval authorities of the United States and disarmed, under the following conditions:

First. Vessel to be taken to Mare Island Navy-Yard and there disarmed by removal of small guns, breechblocks of large guns, small arms, ammunition and ordnance stores, and such other dismantlement as may be prescribed by the commandant of the navy-yard.

Second. Written guarantee that *Lena* shall not leave San Francisco until peace shall have been concluded. Officers and crew to be paroled, not to leave San Francisco until some other understanding as to their disposal may be reached between this Government and both belligerents.

Third. After disarmament, vessel may be removed to private dock for such reasonable repairs as will make her seaworthy and preserve her in good condition during detention, or be so repaired at the navy-yard, should the Russian commander so elect. While at private dock the commandant of the navy-yard at Mare Island shall have custody of the ship, and the repairs shall be overseen by an engineer officer to be detailed by commandant of navy-yard.

Fourth. The cost of repairs, of private docking, and of maintenance of the ship and her officers and crew while in custody to be borne by the Russian Government, but the berthing at Mare Island and the custody and surveillance of the vessel to be borne by the United States.

Fifth. When repaired, if peace shall not then have been concluded, the vessel to be taken back to Mare Island and there held in custody until the end of the war.

ALVEY A. ADEE,
Acting Secretary of State.

Mr. Adee to Count Cassini.

[Telegram.]

DEPARTMENT OF STATE,
Washington, September 16, 1904.

DEAR MR. AMBASSADOR: Your telegram of yesterday reached me in the evening. As I explained to Mr. Hansen, the request of my telegram of the 14th for a decision between the alternatives in the *Lena* case was superseded by the formal application of Captain Berlinsky and by my telegram to you of yesterday morning apprising you of the decision to disarm. I am glad the incident has been so satisfactorily closed.

ALVEY A. ADEE.

Count Cassini to Mr. Adee.

[Translation.]

BAR HARBOR, *September 20, 1904.*

MR. ASSISTANT SECRETARY OF STATE: The Imperial Government has just advised me, and charges me to acquaint the Federal Government with the fact that it adheres to the provisions taken by the President concerning the disarmament and the other measures and provisions of the transport *Lena*, which entered the port of San Francisco on the 11th instant, and whose boilers and other machinery demand urgent repairs.

There remains to settle the question of the repatriation of the crew of the transport *Lena*. The Imperial Government expresses the firm assurance that the Federal authorities will facilitate the passage of the officers and seamen of the *Lena* across the territory of the United

States, according them all the assistance compatible with the duties of neutrality and the amicable relations existing between the two countries. Captain Berlinsky, commander of the *Lena*, has expressed to me a desire that five officers and 100 seamen shall remain in San Francisco for necessary (intérieur) service on the transport. I do not doubt, Mr. Assistant Secretary of State, that these requests, which I have the honor to communicate to you, will be received by the Federal Government in the spirit of justice and impartiality which distinguishes it.

Be pleased to accept, Mr. Assistant Secretary of State, etc.,

CASSINI.

Mr. Loomis to Count Cassini.

DEPARTMENT OF STATE,
Washington, September 24, 1904.

MY DEAR MR. AMBASSADOR: Your note of the 20th instant, addressed to Mr. Adee, has been received, and as I have returned to my post, the agreeable duty of replying to it devolves upon me.

I have shown it to the President, who is glad that the Imperial Government appreciates the course which, in the exercise of his executive prerogative and in consonance with international law, he found it incumbent upon him to pursue in respect to the disarmament of the *Lena* in execution of the policy of strict neutrality adopted by this Government.

The President, however, directs me to say that he would not find it consistent with the neutral course it behooves him to follow to act upon a request for the repatriation of any of the officers or crew of the *Lena* unless he were advised that the two belligerent powers were in accord as to doing so. Without their agreement to that end he regards the position of these men as being identical in principle with that of a military force entering neutral territory and there necessarily to be held by the neutral. He could not take upon himself the function of repatriating the men under parole to return to Russia for that would be the prerogative of the belligerent and not of the neutral.

If it should be the wish of your Government to have the request brought to the attention of the Japanese Government it may be timely for me to say that we have an intimation to the effect that if overtures in this sense were made by us the consent of Japan would not be given.

I have pleasure in assuring you, however, that every effort will be made to render the detention of the officers and crew of the *Lena*, as well as of Captain Günther, who is stated to have been a passenger, as little irksome as is consistent with the President's determination to carry out to the full the neutrality he has proclaimed.

I am, etc.,

FRANCIS B. LOOMIS.

Count Cassini to Mr. Hay.

[Translation.]

IMPERIAL EMBASSY OF RUSSIA,
Washington, December 10, 1904.

MR. SECRETARY OF STATE: Russia and all the Russians residing abroad will on the 6th/19th December celebrate the name day of His Majesty the Emperor, my august master.

Captain Berlinsky, commanding officer of the transport ship *Lena*, which, as your excellency knows, lies disarmed at San Francisco until the end of the present war, would like to celebrate that day, which all Russians hold so dear, by hoisting on that solemn occasion, and for that day only, the national flag, dressing his ship, and firing the imperial salute. I cherish the hope, Mr. Secretary of State, that the Federal Government will see no objection to yielding to Captain Berlinsky's request and will thus afford him the opportunity of paying the homage of his respect and veneration to his august sovereign.

While transmitting this request of Captain Berlinsky's, and most especially commending it to your customary courtesy, I beg your excellency, etc.,

CASSINI.

Mr. Hay to Count Cassini.

No. 252.] DEPARTMENT OF STATE,
Washington, December 14, 1904.

EXCELLENCY: I have received your valued note of the 10th of December, in which you inform me that Captain Berlinsky, commanding officer of the transport ship *Lena*, which lies disarmed at San Francisco until the end of the present war, would like to celebrate the name day of His Majesty the Emperor, which all Russians hold so dear, by hoisting on that solemn occasion, and for that day only, the national flag, dressing his ship, and firing the imperial salute.

I have considered the matter with care and with the earnest desire to meet in all things your excellency's wishes. It seems, however, that the *Lena*, not being at this time a ship in active commission, lying in a friendly open port, but being held in the Mare Island Navy-Yard completely disarmed, in the custody of the United States until the end of the existing war, her character as a war ship, including the function of saluting and the right to receive salutes, is in abeyance.

Under these circumstances the anomaly and inconvenience of firing the suggested salute in an American navy-yard without being competent to salute the American flag and without being entitled to a salute in return, lead me to the conclusion that it is not practicable to acquiesce in that feature of Captain Berlinsky's programme. While

regretting this decision touching the salute, it affords me much pleasure to say that as to the display of the national standard and dressing the ship no inconvenience is seen in the appropriate commemoration of the name day of his Imperial Majesty on board the *Lena* in all suitable ways consistent with the present status of the vessel. We have so informed the American admiral on that station.

I beg, etc.,

JOHN HAY.

(U. S. Foreign Relations, 1904, pp. 785–790.)

The squadron of Admiral Enquist was interned at Manila early in June, 1905, after the battle of the Sea of Japan (May 27, 1905). On June 5, 1905, the President directed the Secretary of War to send the following telegram to the governor of the Philippine Islands:

Advise Russian admiral that as his ships are suffering from damages due to battle, and our policy is to restrict all operations of belligerents in neutral ports, the President can not consent to any repairs unless the ships are interned at Manila until the close of hostilities. You are directed, after notifying the Russian admiral of this conclusion, to turn over the execution of this order to Admiral Train, who has been advised accordingly by the Secretary of the Navy.

The President directed that a strict enforcement of the twenty-four-hour rule be applied in view of the fact that the damage to the ships was due to acts of the enemy in battle and not to the action of the elements or accidents. It was maintained that to allow vessels injured in battle to refit in a neutral port would practically make the neutral port a naval base for the belligerent.

The action of the Government of the United States was publicly stated, as follows, in an announcement of June 6, 1905:

The Secretary of War is in receipt of a cablegram from Governor Wright announcing that Secretary Taft's instructions of yesterday had been formally transmitted to the Russian admiral, and at the same time inquiry was made whether he would be required to put to sea within twenty-four hours after taking on coal and provisions sufficient to take them to nearest port. That up to this time only enough coal and sufficient food supplies for use in harbor to last from day to day had been given, as they arrived in Manila with practically no coal or provisions. Governor Wright submitted the question as to whether they were entitled to take on coal and provisions to carry them to nearest port. Governor Wright was advised that the President directed that the twenty-

four hours' limit must be strictly enforced; that necessary supplies and coal must be taken on within that time, these instructions being consistent with those of June 5, stating that as the Russian admiral's ships were suffering from damages due to battle the American policy was to restrict all operations of belligerents at neutral ports—in other words, that time should not be given for repairs of damages suffered in battle.

Commander Von Uslar, of the German navy, thinks that the United States exceeded its measure of duty in the treatment of Admiral Enquist's squadron in the Philippines. He says:

The old rules of neutrality do not restrict the stay of the ships of belligerents in any respect more than in times of peace. They permit all articles of equipment to be supplied, and any repairs to be made that do not immediately contribute to enhance the fighting capabilities. The new principle advanced by England in 1861, and accepted first by the United States and later by many other countries, limits the duration of the stay to twenty-four hours, and permits sufficient coal to be taken on board to enable the vessel to reach the nearest port of her own country or some nearer destination and repairs to restore seaworthiness.

It can not be denied that the new rules, even if the old principle remains in force, are better adapted to certain cases of neutrality. A compromise between the two, therefore, will best suit the actual conditions created by war, if the French rules are applied in the case of ports and waters which are at a distance from the sphere of operation of the hostile fleets and the English remain valid for ports and waters within or near the sphere of operations. The neutrals must have the right but be under no obligation to close completely certain ports and bays. The difficulty of this distinction lies in the conception of the sphere of operations. It will have to be taken to mean that portion of the sea on which the opposing forces permanently maneuver for the purpose of warlike operations. Ships which directly seek refuge from the enemy in neutral waters, and prizes, would have to be treated without regard to the distance from the chief theater of war.

The extent and duration of the repairs necessary to restore seaworthiness must be fixed by the neutral government. The latter must make no distinction between damages sustained on the voyage or by the action of the enemy's guns, as it would act in the interests of the other belligerent if it made the repairs dependent on this distinction. The action of the United States Government toward the ships of Admiral Enquist undoubtedly exceeded the measure of duty. The German Government also did more at Tsingtau than duty demanded. Ships which do not leave the ports and waters after the expiry of the fixed term render themselves liable to disarmament. (North American Review, Aug., 1905, vol. 181, p. 188.)

Conclusion.—The precedents of the Russo-Japanese war have led to the definite acknowledgment of the correctness of the doctrine of internment by neutral states of belligerent vessels seeking refuge from the force of the enemy in neutral ports. This principle has been acknowledged or definitely acted upon by China, France, Great Britain, Germany, Japan, United States, and Russia. These include nearly all the states with considerable navies. Rarely has any principle received such general recognition within so short a period.

It may be safely said that the entrance and sojourn for a period of more than twenty-four hours in a neutral port will render a belligerent vessel which is pursued by the enemy or damaged in battle liable to internment.

As a neutral has full jurisdiction over his own ports and as entry of the ports is a privilege granted to foreign war ships, the neutral has full rights to enforce by any means within his power the regulations which may have been prescribed for entrance and sojourn within his ports.

Topic X.

Is there sufficient ground for the recognition of certain acts as a distinct class under some such name as "unneutral service?"

CONCLUSION.

The category of "unneutral service," which has been admitted in decisions of the courts, explained in the works of the text writers, described in proclamations, and distinguished in practice, deserves and should receive full and explicit recognition.

DISCUSSION AND NOTES.[a]

Development of doctrine of neutrality.—It is now generally admitted that the rights and duties of neutrals in time of war are correlative. It was formerly claimed that the denial or grant of the same privileges to both belligerents constituted neutrality. Such a doctrine of neutrality might make it possible for a state to deny all the privileges which the first party to the war would especially need and which the second might not need, and to grant those privileges which the second might need and which the first might not need. It was seen that such a position was not neutral in fact, if sometimes so called. Gradually a more equitable view has come to prevail. Neutrality is at present held to demand "an entire absence of participation, direct or indirect, however impartial it may be."

The state is responsible for the observance of neutrality within its sphere of competence. The state is responsible for its own action or failure to act where its jurisdiction can reasonably be exercised. The neutral state can not be

[a] A part of the following discussion appeared in the proceedings of the American Political Science Association, 1904, "Unneutral Service," George Grafton Wilson, p. 68.

required to assume the burdens of prosecuting the war, however. If certain articles are declared contraband of war, the belligerent making the declaration can not claim that the neutral state is under obligation to prevent its merchants from shipping such articles from neutral ports in the way of ordinary trade. To demand that the neutral prevent the sale of many articles included within the lists of contraband would be to put the burden of enforcing a belligerent's declaration upon the neutral, and this at the expense of the neutral's trade.

Neutrality is, however, binding not merely upon the state, but also upon the citizens of the neutral state. The state is responsible for its own direct or indirect participation in any violation of neutrality, as in the case where it allows its ports to be a place for the fitting out of hostile expeditions. It is not, however, responsible for the action of each of its citizens, nor can it be. The citizen is ordinarily informed by declaration of neutrality of the position which the state proposes to assume and the citizen is liable to certain consequences for violation of the provisions of the declaration.

As regards the citizen of the neutral state, the declaration usually makes known:

1. That the citizen himself will become liable to certain penalties which the neutral government may inflict in case he performs certain acts within the jurisdiction of the neutral state which may lay the state open to claims of indemnity because of failure to observe neutrality, e. g., if within the jurisdiction of the neutral state he fits out an hostile expedition or accepts and exercises a commission from the belligerent.

2. That the citizen's property will become liable to certain treatment by the enemy if he undertakes certain acts, e. g., carriage of contraband to the belligerent, or violation of the blockade, when the goods or both goods and vessel may be seized by the belligerent.

The penalty for the acts of the first class falls upon the person of the guilty neutral, and if found guilty within its jurisdiction the penalty is imposed by his own state. The penalty for acts of the second class falls upon the

goods, or goods and vessel, and is inflicted by the belligerent. In this latter case the neutral person is not regarded as guilty of offense and is not made a prisoner of war.

There is a third class of acts which partake somewhat the nature of the acts of the first class which are forbidden and penalized by the neutral state. These are often committed beyond the jurisdiction and responsibility of the neutral state, and when undertaken by the neutral citizen do not involve the neutral state in liability unless the state is in some way a party to the acts.

Various attempts have been made to bring these acts under one of the first two classes mentioned above. Attempts also have been made to assimilate the acts to the carriage of contraband or violation of blockade. Some of the acts have been considered analogous to contraband. The acts of this third class differ very widely, however, in nature, intent, and penalty, from the carriage of contraband or violation of blockade. The nature of the carriage of contraband is commercial, the intent is to obtain exceptional profits because of the special demands of the state at war, and the penalty is the confiscation of the contraband goods. Thus considered, the idea of contraband becomes reasonably clear, though the applications of the principles underlying the doctrine of contraband may not always be easy in concrete instances. It is natural that the attempt should be made to include the forms of service which the neutral should not undertake under the laws of contraband, because the idea of contraband was clear long before there was any clear idea of neutrality. Grotius, in 1625, makes an excellent classification of contraband, upon which little improvement has been made. His conception of neutrality is, however, very far from the modern idea. Indeed, the current ideas of neutrality have for the most part developed within one hundred years. Many writers did not fully comprehend this development and tried to extend the old nomenclature of contraband and blockade to cover new conditions possessing characteristics which did not admit such classification. It would be a difficult problem so to extend the proper doctrine of contraband as to cover

certain acts which have been sometimes classed as analogous to contraband. Even while using the term "analogues of contraband," speaking of the analogy which the carriage of military dispatches and persons possesses to the carriage of articles contraband of war, admits that it is "always remote."

One of the acts most frequently classed as analogous to the carriage of contraband is the carriage of dispatches for the enemy. Upon this subject there has been much discussion, especially since the attempted defense of the action of the United States in the case of the *Trent* in 1861.

British opinions distinguishing service from contraband.—The difference between the carriage of contraband and the aid afforded by the transmission of information was early recognized by Sir William Scott. He, in the case of the *Atalanta* in 1808, said:

> If a war intervenes and the other belligerent prevails to interrupt that communication (between mother country and colony), any person stepping in to lend himself to effect the same purpose, under the privilege of an ostensible neutral character, does in fact place himself in the service of the enemy state, and is justly to be considered in that character. Nor let it be supposed that it is an act of light and casual importance. The consequence of such a service is indefinite, infinitely beyond the effect of any contraband that can be conveyed. The carrying of two or three cargoes of stores is necessarily an assistance of limited nature; but in the transmission of dispatches may be conveyed the entire plan of the campaign that may defeat all the projects of the other belligerent in that quarter of the world. * * * The practice has been, accordingly, that it is in considerable quantities only that the offense of contraband is contemplated. The case of dispatches is very different; it is impossible to limit a letter to so small a size as not to be capable of producing the most important consequences in the operations of the enemy. It is a service, therefore, which, in whatever degree it exists, can only be considered in one character, as an act of the most noxious and hostile nature. (6 C. Rob., 440.)

This opinion of the great English jurist, rendered early in the nineteenth century, shows that the transmission of dispatches of varying character can not properly be put in the same category with contraband because so different in nature and results.

In other cases Great Britain has recognized that penalties may attach directly to service.

In the case of Burton *v.* Pinkerton, in Great Britain, in 1867, it was held—

> That to serve on board a vessel used as a storeship in aid of a belligerent, the fitting out of which to be so used is an offense within the seventh section, is "serving on board a vessel for a warlike purpose in aid of a foreign state," within the second section. (L. R. Q. Exch., 340.)

The vessel in question was the *Thames*, which was serving as a storeship for Peruvian war vessels in the war between Peru and Spain.

By section 8 of the foreign enlistment act, 1870, "if any person within Her Majesty's dominions, without Her Majesty's license, dispatches any ship with intent that the same shall be employed in the military or naval service of any foreign state at war with any friendly state, the ship in respect of which any such offense is committed and her equipment shall be forfeited to Her Majesty."

Recent British opinions.—The British authorities, in 1904, reaffirmed positions previously taken. They recognized such acts as different in nature from the carriage of contraband, and as involving different penalties. The acts were regarded as practically acts in the naval service of one of the belligerents. This is seen in the following letter, which was, by direction of the Marquis of Lansdowne, addressed to the Chamber of Shipping of the United Kingdom, to the Association of Chambers of Commerce of the United Kingdom, and to certain other associations:

FOREIGN OFFICE, *November 25, 1904.*

SIR: On the 25th ultimo a letter was received by the foreign office from Messrs. Woods, Tyler & Brown, asking whether it was permissible "for British shipowners to charter their boats for such purposes as following the Russian fleet with coal supplies;" and by the Marquis of Landsowne's directions they were informed that "it is not permissible for British owners to charter their vessels for such a purpose."

In view of the numerous inquiries which have been addressed to His Majesty's Government on this subject, I am instructed to explain that action of the kind described in Messrs. Woods' letter might render those concerned liable to proceedings under subsections 3 and 4 of

the eighth section of "the foreign enlistment act, 1870." (33 and 34 Vict., cap. 90.) This section, so far as it is material, runs as follows:

"8. If any person within Her Majesty's dominions, without the license of Her Majesty, does any of the following acts, that is to say—

"(3) Equips any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state; or

"(4) Dispatches, or causes or allows to be dispatched, any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state;

"Such person shall be deemed to have committed an offense against this act, and the following consequences shall ensue:

"(1) The offender shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labor.

"(2) The ship in respect of which any such offense is committed, and her equipment, shall be forfeited to Her Majesty."

The interpretation clause, section 30, defines "naval service" and "equipping" as follows:

"'Naval service' shall, as respects a person, include service as a marine, employment as a pilot in piloting or directing the course of a ship of war or other ship, when such ship of war or other ship is being used in any military or naval operation, and any employment whatever on board a ship of war, transport, storeship, privateer, or ship under letters of marque; and as respects a ship include any user of a ship as a transport, storeship, privateer, or ship under letters of marque.

"'Equipping' in relation to a ship shall include the furnishing a ship with any tackle, apparel, furniture, provisions, arms, munitions, or stores, or any other thing which is used in or about a ship for the purpose of fitting or adapting her for the sea or for naval service, and all words relating to equipping shall be construed accordingly.

"'Ship and equipment' shall include a ship and everything in or belonging to a ship."

A similar question arose in 1870 during the Franco-German war, and on the 1st of August of that year a question on the subject was put to and was answered by Mr. Gladstone, then prime minister. The foreign enlistment act then in force was that of 1819 (59 Geo. III, cap. 69), containing provisions similar upon this point to those of the act of 1870, which was about to replace it and which received the royal assent on the 9th of August. The question and answer were as follows:

"Mr. Stapleton asked the first lord of the treasury whether his attention has been called to the report that the French fleet in the Baltic is to be supplied with coal direct from this country; whether it

would be consistent with neutrality to allow any vessels, either French, English, or others, to carry coal direct from this country to a belligerent fleet at sea; and whether English vessels so engaged would be entitled to the protection of their country if the other belligerent should treat them as enemies, considering them part of the armament to which they were acting as tenders.

"Mr. Gladstone replied: 'Sir, the House has already been apprised on more than one occasion that there is nothing in a general way to prevent the exportation of coal from this country. If either of the belligerents capture those vessels supplying coal, the question whether it is contraband of war will be a question for the consideration of the court of the captors. But the honorable gentleman has called attention to a particular case, and although the exportation of coal is not generally prohibited, exporters being warned that if it be supplied to either of the belligerents they run the risk of capture, yet of course the case reported, which I can neither affirm nor deny, as I have no more knowledge of it than he has—that is to say, the knowledge derived from general rumor—presents itself under a somewhat different aspect, and in that form the question has been referred to the law officers of the Crown. They have given their opinion, which we have adopted, that if colliers are chartered for the purpose of attending the fleet of a belligerent, and supplying that fleet with coal for the purpose of enabling it to pursue its hostile operations, such colliers would to all practical intents and purposes become storeships to that fleet, and if that fact were established they would be liable, if within reach, to the operation of the English law under the provisions of the foreign-enlistment act. It will be the duty of the Government, and they will act upon that duty when such reports arise, to institute searching inquiries into the existence of any such case.'"

Although, therefore, neutral traders may carry on trade even in contraband with belligerents, subject to the risk of capture of their goods, it is necessary that such traders should bear in mind the condition of the law of this country as set forth in the foregoing enactments, which, moreover, have been applied recently by orders in council in British protectorates and also in countries where the King exercises extraterritorial jurisdiction over his own subjects.

I am, etc.,

(Signed) F. A. CAMPBELL.

American opinions distinguishing service from contraband.—The United States courts as well as the British courts have recognized the difference in nature between commerce in contraband and commerce undertaken in the enemy's employ.

In the case of the *Julia*, Story rendered the opinion of the United States Supreme Court in 1814, to the effect "that the sailing on a voyage under the license and pass-

port of the enemy, in furtherance of his views or interests, constitutes such an act of illegality as subjects the ship and cargo to confiscation as prize of war." (8 Cranch, 181.)

The opinion rendered in the case of the *Julia* was subsequently followed with approval in other cases. (The *Aurora*, 8 Cranch, 203; the *Hiram*, 8 Cranch, 444; the *Ariadne*, 2 Wheaton, 143.) In all these cases subjects of one of the belligerents accept the service of the other and sail under his license. The principle applies equally to a neutral accepting such service for one of the belligerents.

Indeed, it may not be necessary that the master of a vessel be a knowing party to the undertaking which aids the enemy. Lord Stowell has held that "It will be sufficient, if there is injury arising to the belligerent from the employment in which the vessel is found. The master may be ignorant and perfectly innocent. But if the service is injurious, that will be sufficient to give the belligerent the right to prevent the thing from being done." (6 Rob., 430)

Not merely in court decisions, but in the opinions of text writers, distinctions are made in the acts of neutrals.

Dana, in note 228 to Wheaton, speaking of the carrying of hostile persons or papers, in contrast to contraband, says:

> But the subject now under consideration is of a different character. It does not present cases of property or trade, in which such interests are involved, and to which such considerations apply, but simply cases of personal overt acts done by a neutral in aid of a belligerent. * * *
>
> Suppose a neutral vessel to transmit signals between two portions of a fleet engaged in hostile combined operations, and not in sight of each other. She is doubtless liable to condemnation. It is immaterial whether these squadrons are at sea or in ports of their own country or in neutral ports, or how far they are apart or how important the signals actually transmitted may be to the general results of the war, or whether the neutral transmits them directly or through a repeating neutral vessel. The nature of the communication establishes its final destination, and it is immaterial how far the delinquent carries it on its way. The reason of the condemnation is the nature of the service in which the neutral is engaged. (Wheaton, D., International Law, note 228.)

The distinctions clearly made in the early half of the nineteenth century seem to have been somewhat neg-

lected in the latter half, and from this neglect confusion in treatment and forced constructions have arisen.

Recent continental opinion.—Kleen, writing of this attempt to extend the doctrine of contraband to cover services, persons, etc., says:

> Quelquefois ont été rangés parmi les articles de contrebande de guerre certains objets qui n'y appartiennent pas, bien que leur transport pour le compte ou à destination d'un belligérant puisse être interdit. Non seulement chez des publicistes mais aussi dans des lois et traités, certaines *personnes* et *communications* sont considérées comme une espèce de contrebande, du moment qu'elles ont été apportées à un ennemi ou transportées à cause de lui, de manière à le renforcer ou l'aider dans la guerre, soit matériellement soit même intellectuellement. C'est ainsi que se rencontrent depuis longtemps sur les listes de contrebande des objets tels que "soldats," "troupes," etc., dernièrement aussi "documents."
>
> Comme toutefois cet élargissement de la notion de la contrebande de guerre se conciliait peu avec la terminologie juridique, les personnes et les correspondances n'étant ni des marchandises ni des munitions, tandis que la contrebande a été de tout temps définie comme telles, les choses ainsi intruses dans sa catégorie n'y furent pas toujours rangées *de la même façon* que les autres objets prohibés, ni sans restriction. Parfois, il est vrai, on les trouve simplement insérées dans les listes comme des articles de contrebande ordinaires. Mais d'autres fois elles y sont ajoutées ("assimilées") sous d'autres dénominations, un peu modifiées, par exemple sous la qualification de contrebande improprement dite ou dans le sens figuré, "quasi-contrebande," "analogues de la contrebande," etc. (La Neutralité, vol. 1, p. 452.)

Pillet, after speaking of contraband in the ordinary sense, says:

> La théorie de la contrebande a trouvé sa place dans une dernière hypothèse bien différente de celles que nous avons considérées jusqu'ici. C'est dans le cas où un navire neutre transporte pour le compte de l'ennemi des troupes, des dépêches, ou certains hauts fonctionnaires, des ambassadeurs par exemple. On appelle ce transport contrebande par analogie. L'analogie, il faut ici le reconnaître, est assez lointaine; il ne s'agit plus de marchandises mais de personnes, et la sanction du transport illicite ne peut consister que dans la seule condamnation du vaisseau. (Les Lois Actuelles de la Guerre, par. 218, p. 330.)

Names given to service.—Whatever the name, a considerable range of actions involving neither the doctrine of contraband nor the doctrine of blockade should have some distinguishing name. Various names have been from time

to time given to some of these actions, such as "accidental contraband," "analogues of contraband," "enemy service," "unneutral service," etc. The terms involving the use of the word "contraband" are admittedly inappropriate and forced. The term "enemy service" would be ambiguous because often used in a sense not involving any of the actions here discussed. The phrase "unneutral service" seems to be the least ambiguous and most distinctly descriptive. The decisions of the courts and the opinions of the writers point clearly to the fact that it is the nature of the service which must be considered in certain cases, while the nature and destination of the goods in case of contraband, and the military condition of the place in the case of blockade, determines the penalties.

Unneutral service and contraband.—Professor Lawrence recently very properly pointed out that: "In truth between the carrying of contraband and the performance of what we may call unneutral service there is a great gulf fixed." (Principles of International Law, p. 624.)

> We are now in a position to distinguish clearly between the offense of carrying contraband and the offense of engaging in unneutral service. They are unlike in nature, unlike in proof, and unlike in penalty. To carry contraband is to engage in an ordinary trading transaction which is directed toward a belligerent community simply because a better market is likely to be found there than elsewhere. To perform unneutral service is to interfere in the struggle by doing in aid of a belligerent acts which are in themselves not mercantile but warlike. In order that a cargo of contraband may be condemned as a good prize, the captors must show that it was on the way to a belligerent destination. If without subterfuge it is bound to a neutral port the voyage is innocent, whatever may be the nature of the goods. In the case of unneutral service the destination of the captured vessel is immaterial. The nature of her mission is the all-important point. She may be seized and confiscated when sailing between two neutral ports. The penalty of carrying contraband is the forfeiture of the forbidden goods, the ship being retained as prize of war only under special circumstances. The penalty for unneutral service is first and foremost the confiscation of the vessel, the goods on board being condemned when the owner is involved or when fraud and concealment have been resorted to.
>
> Nothing but confusion can arise from attempting to treat together offenses so widely divergent as the two now under consideration. Ibid., p. 633.

Dupuis distinguishes the penalty for carriage of contraband and that for unneutral service. He says:

S'agit-il de contrebande de guerre, c'est d'ordinaire une simple aventure commerciale que tente l'expéditeur et que sert le navire chargé du transport, pour tous deux, le mobile habituel est l'intérêt, l'espoir d'un bénéfice à réaliser. S'agit-il de transports de troupes, d'agents ou de dépêches ennemis, l'ordre d'envoi est dû à de tout autres motifs; ce sont des considérations de guerre qui le dictent; le navire qui l'exécute ne se fait pas l'instrument d'une affaire dont le contre-coup n'atteint qu'indirectement l'ennemi; il se fait le complice d'un acte de guerre dirigé contre lui. Si l'attrait du gain peut être l'unique mobile de sa complicité, il n'en reste pas moins que aide qu'il procure à l'un des belligérants est d'un tout autre ordre que le transport de contrebande de guerre; il revêt un caractère plus grave et une teinte d'hostilité beaucoup plus accentuée. C'est assez pour modifier la nature de l'infraction et pour justifier une sanction plus rigoureuse.

Autorisées par la gravité de l'acte, les sévérites plus grandes de la répression sont d'ailleurs commandées par des nécessités pratiques. Il est plus aisé de dissimuler la présence à bord d'agents ou de dépêches que celle de marchandises de contrebande; l'infraction est d'autant plus facile à commettre que la surveillance est plus facile à déjouer; il faut, pour en détourner, que le risque moins grand d'être découvert soit compensé par le risque plus redoutable d'une sanction plus rude en cas de surprise. Aussi ne se contentet-on pas d'empêcher troupes, agents ou dépêches surpris de parvenir à destination; la confiscation frappe, en principe au moins, le navire qui les porte. (La Guerre Maritime et les Doctrines Anglaises, p. 282.)

Forms of unneutral service.—As states have drawn nearer together through the elimination of the barriers of time and space in matters of communication, the possibilities of unneutral service have greatly multiplied. It would not be possible to be neutral in modern days and to maintain with Grotius that "it is the duty of those who have no part in the war to do nothing which may favor the party having an unjust cause, or which may hinder the action of the one waging a just war, * * * and in a case of doubt to treat both belligerents alike, in permitting transit, in furnishing provisions to the troops, in refraining from assisting the besieged." (De Jure Belli ac Pacis. Lib. III, C. XVI, iii, i.)

Modern neutrality proclamations have by various circumlocutions tried to prohibit acts involving assistance by neutral subjects in the performance of warlike acts. The

proclamation of the United States of February 11, 1904, issued in consequence of the Russo-Japanese war, after recognizing the general principle, "free ships, free goods, except contraband of war, and free goods always free, except contraband of war," in a qualified way warns its citizens against unneutral service, saying "that while all persons may lawfully, and without restriction because of the aforesaid state of war, manufacture and sell within the United States 'arms and munitions of war,' and other articles ordinarily known as 'contraband of war,' yet they can not carry such articles upon the high seas for the use or service of either belligerent, nor can they transport soldiers and officers of either, or attempt to break any blockade which may be lawfully established and maintained during the war without incurring the risk of hostile capture and the penalties denounced by the law of nations in that behalf."

The distinction is clearly made in the same war in the proclamation of the Netherlands Government to its citizens in which "their attention, and especially that of captains, shipowners, and ship brokers, is directed to the danger and risks consequent on the nonobservance of efficient blockade of the belligerent parties, the conveyance for them of contraband of war or military dispatches (unless in the way of regular postal service), and the execution of any other transport service in their interest." The "Instructions to Blockading Vessels and Cruisers" issued by the Navy Department of the United States, June 20, 1898, as General Order, No. 492, section 16, provides that "a neutral vessel in the service of the enemy in the transportation of troops or military persons is liable to seizure;" and in section 15, that "a neutral vessel carrying hostile dispatches, when sailing as a dispatch vessel practically in the service of the enemy, is liable to seizure, but not when she is a mail packet and carries them in the regular and customary manner."

Hall has given considerable attention to what he terms "analogues of contraband." He says:

With the transport of contraband merchandise is usually classed analogically that of dispatches bearing on the conduct of the war and

of persons in the service of a belligerent. It is, however, more correct and not less convenient to place adventures of this kind under a distinct head, the analogy which they possess to the carriage of articles contraband of war being always remote. They differ from it in some cases by involving an intimacy of connection with the belligerent which can not be inferred from the mere transport of contraband of war, and in others implying a purely accidental and almost involuntary association with him. They are invariably something distinctly more or something distinctly less than the transport of contraband amounts to. When they are of the former character they may be undertaken for profit alone, but they are not in the way of mere trade. The neutral individual is not only taking his goods for sale to the best market, irrespectively of the effect which their sale to a particular customer may have on the issue of the war, but he makes a specific bargain to carry dispatches or persons in the service of the belligerent for belligerent purposes. He thus personally enters the service of the belligerent, he contracts as a servant to perform acts intended to affect the issue of the war, and he make himself in effect the enemy of the other belligerent. (Hall, International Law, 5th ed., p. 673.)

A neutral vessel becomes liable to the penalty appropriate to the carriage of persons in the service of a belligerent, either when the latter has so hired it that it has become a transport in his service and that he has entire control over it; or when the persons on board are such in number, importance, or distinction, and at the time the circumstances of their reception are such as to create a reasonable presumption that the owner or his agent intend to aid the belligerent in his war.

In the transport of persons in the service of a belligerent the essence of the offense consists in the intent to help him; if, therefore, this intent can in any way be proved, it is not only immaterial whether the service rendered is important or slight, but it is not even necessary that it shall have an immediate local relation to warlike operations. (Hall, International Law, 5th ed., p. 676.)

The Russian declaration of February 14, 1904, section 7, states that—

There are assimilated to contraband of war the following acts, forbidden to neutrals: The transport of enemy troops, the dispatches or correspondence of the enemy, the furnishing of transports or ships of war to the enemy. Neutral vessels guilty of forbidden acts of this character may be, according to circumstances, seized and confiscated.

The position taken by Russia is entirely justifiable, and the persons concerned in the service become prisoners of war. Hall sets forth the contrast as follows:

It will be remembered that in the case of ordinary contraband trade the contraband merchandise is confiscated, but the vessel usually

suffers no further penalty than loss of time, freight, and expenses. In the case of transport of dispatches or belligerent persons the dispatches are of course seized, the persons become prisoners of war, and the ship is confiscated. The different treatment of the ship in the two cases corresponds to the different character of the acts of its owner. For simple carriage of contraband the carrier lies under no presumption of enmity towards the belligerent, and his loss of freight, etc., is a sensible deterrent from the forbidden traffic; when he enters the service of the enemy seizure of the transported objects is not likely to affect his earnings, while at the same time he has so acted as fully to justify the employment towards him of greater severity. (Hall, International Law, 5th ed., p. 678.)

Halleck (International Law, 3d ed., Baker, Vol. II, Ch. XXV) says of a place blockaded in distinction from a place besieged:

But there is an important distinction, with respect to neutral commerce, between a maritime blockade and military siege. The object of a blockade is solely to distress the enemy, intercepting his commerce with neutral states. It does not, generally, look to the surrender or reduction of the blockaded port, nor does it necessarily imply the commission of hostilities against the inhabitants of the place. The object of a military siege is, on the other hand, to reduce the place, by capitulation or otherwise, into the possession of the besiegers. It is by the direct application of force that this object is sought to be attained, and it is only by forcible resistance that it can be defeated. Hence every besieged place is for the time a military post, for even when it is not defended by the military garrison its inhabitants are converted into soldiers by the necessity of self-defense. This distinction is not merely nominal, but, as will be shown hereafter, leads to important consequences in determining the rights of neutral commerce and in deciding questions of capture.

It might be inferred by parity of reasoning that when a port is under a military siege neutral commerce might still be lawfully carried on by sea, through channels of communication which could not be obstructed by the forces of the besieging army. But such inference would not be strictly correct, for the difference between a blockade and a siege, in their character and object, have led to a difference in the rules applicable in the two cases to neutral commerce. Although the legal effects of a siege on land that is purely a military investment of a naval or commercial port may not be an entire prohibition of neutral commerce, yet it does not leave the ordinary communications by sea open and unrestricted, as a purely maritime blockade leaves the interior communications by land. The primary object of a blockade is, as we have already said, to prohibit commerce; but the primary object of a siege is the reduction of the place. All

writers on international law impose upon neutrals the duty of not interfering with this object. To supply the inhabitants of a place besieged with anything required for immediate use, such as provisions and clothing, might be giving them aid to prolong their resistance. It is, therefore, a clear departure from neutral duty to furnish supplies, even of possible utility, to a port in a state of siege, although communication by sea may be open. It would be a direct interference in the war, tending to the relief of one belligerent and to the prejudice of the other; and such supplies are justly deemed contraband of war, to the same extent as if destined to the immediate use of the army or navy of the enemy. Hence, although the prohibition of neutral commerce with a port besieged be not entire, yet it will extend to all supplies of even possible utility in prolonging the siege.

From the discussion thus far it is evident that the forms of unneutral service which have been hitherto most common are—

1. Carriage of enemy dispatches or correspondence.
2. Carriage of enemy persons.
3. Enemy transport service.

In recent wars, auxiliary coal, repair, supply, cable ships and the like have become of great value. Neutrals may easily engage in such service, and it would be very difficult to extend the doctrine of contraband or of blockade so as to cover their action.

While it might be possible to extend the doctrine of contraband to cover the carriage of certain enemy persons and dispatches, it would be very difficult to extend it so as to cover the service which might be rendered to the enemy by a submarine cable or by the wireless telegraph. Of the use of the submarine cable Capt. C. H. Stockton, U. S. Navy, says:

Besides the contraband character of the material of a telegraph cable, in use or en route, as an essential element of belligerent communication which renders it liable to seizure anywhere out of neutral territory, there is another phase of this question, and that is in regard to the nature of the service afforded by such a communication by a neutral proprietor to a belligerent.

This service is in the nature of both an evasion of a blockade and, what has been termed of late years, of unneutral service. It does not matter in this phase whether the cable be privately or state owned, so far as the technical offense is concerned, though the gravity and consequences are naturally much more serious in the latter case. Let us

take, as an instance, the case of a blocked or besieged port, as Habana or Santiago were during the late hostilities. The communication of information or of dispatches, or of means of assistance which can be made by such means, is an unneutral service, and would resemble also the violation of blockade by a neutral vessel carrying dispatches, the capture of which on the high seas outside of territorial jurisdiction would be a justifiable and indisputable act of war.

Extend this to a country or port not blockaded or besieged, and you would yet find the cable owned, let us presume, by a neutral, the means of performing the most unneutral kind of service, of a nature which, done by a ship, would most properly cause its seizure, condemnation, or destruction by the offended belligerent. (Proceedings U. S. Naval Institute, Vol. XXIV, 3, p. 453.)

Pilotage by a neutral of an enemy vessel, the repetition of signals for the benefit of the enemy by any means, "to supply the inhabitants of a place besieged with anything required for immediate use" (Halleck, International Law; Baker, Vol. II, Chap. XXV), and many other acts, the number of which will continually increase with the development of means of communication, and transmission must be provided against by something beyond the laws of contraband and of blockade.

British Manual.—Chapter VII of the British Manual of Naval Prize Law is upon "Neutral vessels, acting in the service of the enemy." Holland makes the note on this title of the chapter that—

> Vessels engaged in the carriage for the enemy of military persons or dispatches have sometimes been described as engaged in the carriage of "Contraband." See the note to Friendship, 6 Rob., 420. It is conceived that this use of the term is misleading.

The regulations of this chapter are as follows:

ACTING AS A TRANSPORT.

88. A Commander should detain any Neutral Vessel which is being actually used as a transport for the carriage of soldiers or sailors by the Enemy.

89. The Vessel should be detained, although she may have on board only a small number of Enemy Officers, or even of Civil Officials sent out on the public service of the Enemy, and at the public expense.

90. The carriage of Ambassadors from the Enemy to a Neutral State, or from a Neutral State to the Enemy, is not forbidden to a Neutral Vessel for the detention of which such carriage is therefore no cause.

EXCUSES TO BE DISREGARDED.

91. It will be no excuse for carrying Enemy Military Persons that the Master is ignorant of their character.

92. It will be no excuse that he was compelled to carry such Persons by Duress of the Enemy.

LIABILITY OF VESSEL, WHEN IT BEGINS, WHEN IT ENDS.

93. A Vessel which carrys Enemy Military Persons becomes liable to detention from the moment of quitting Port with the Persons on board and continues to be so liable until she has deposited them. After depositing them the Vessel ceases to be liable.

PERSONS NOT TO BE REMOVED.

94. The Commander will not be justified in taking out of a Vessel any Enemy Persons he may have found on board and then allowing the Vessel to proceed; his duty is to detain the Vessel and send her in for Adjudication, together with the Persons on board.

PENALTY.

95. The penalty for carrying Enemy Military Persons is the confiscation of the Vessel and of such part of the Cargo as belongs to her Owner.

Conclusion.—Such acts, as mentioned in the British Manual, and many others, are in the nature of unneutral service. Under some title—and "unneutral service" seems better than any thus far proposed—these acts must be recognized as in a distinct category. Their nature is hostile, because such service should primarily be performed by belligerent agents and agencies. The neutral agent in undertaking the act identifies himself with the belligerent to an extent which makes him liable to the treatment accorded to the belligerent. He is therefore liable to capture as an enemy, and his goods are liable to the treatment accorded to the enemy under similar conditions. The agent may be made a prisoner of war, and the agency may be seized, confiscated, or, in certain instances, so treated as to render it incapable of further rendering unneutral service.

The clear recognition of this category of unneutral service which is gradually manifest will in a measure remove

the confusion resulting from certain forced interpretations of principles of international law. Such principles, as those of contraband and blockade, were formulated at a period when modern ideas of neutrality were unknown and when such ideas, if advocated, would perhaps have been regarded as entirely visionary. Acts which differ in nature, in intent, and in penalty, as do acts involving contraband or blockade from those involving unneutral service, should no longer be confused. The category of "unneutral service" which has been admitted in decisions of the courts, explained in the works of the text writers, described in proclamations, and distinguished in practice, deserves and should receive full and explicit recognition.

APPENDIX.

A TRANSLATION OF THE JAPANESE REGULATIONS GOVERNING CAPTURES AT SEA, WHICH WERE PUBLISHED MARCH 7, 1904, WITH AN AMENDMENT TO THE LIST OF CONTRABAND PUBLISHED FEBRUARY 9, 1905.

JAPANESE REGULATIONS GOVERNING CAPTURES AT SEA.

Regulations governing captures at sea have been settled as follows, and shall be enforced from the fifteenth day of the third month of the thirty-seventh year of Meiji (March 15, 1904).

GENERAL HEADQUARTERS,
Seventh day of the third month of the thirty-seventh year of Meiji.

REGULATIONS GOVERNING CAPTURES AT SEA.

CHAPTER I.—*General rules.*

ARTICLE I. H. I. J. M.'s ships are authorized in time of war to visit, search, and capture vessels according to these regulations.

ART. II. No visit, search, or capture shall be made in neutral waters nor in waters clearly placed by treaty stipulations outside the zone of hostile operations.

ART. III. The national character of a person shall be decided by the place of his actual residence, whatever his nationality may be.

ART. IV. By the place of residence is meant the place where a person permanently lives; in the case of a merchant, the place where he principally carries on his business; and in the case of a consul who is engaged in mercantile business, the place where he carried on that business.

ART. V. The district temporarily occupied by the enemy shall not be considered enemy territory in respect to the national character of persons, ships, and their cargoes.

ART. VI. The following are enemy vessels:

1. Vessels employed by the enemy, including the case in which such employment is compulsory.

2. Vessels voyaging under the enemy's flag or with license of the enemy.

3. Vessels, the whole or part of which is owned by the enemy State or its subjects. Vessels that have certificates of nationality as Japanese, or that voyage under the license of Japan, do not, however come under this rule.

4. Vessels, the ownership of which has been transferred before the war, but in expectation of its outbreak or during the war, by the enemy State or its subjects to persons having residence in Japan or a neutral State, unless there is proof of a complete and bona fide transfer of ownership.

In case the ownership of a vessel is transferred during its voyage, and actual delivery is not effected, such transfer of ownership shall not be considered as complete and bona fide.

ART. VII. Japanese vessels are those which are mentioned below and which do not come under the preceding article:

1. Those which have the certificate of nationality of the Empire or those which voyage under the license of the Imperial Government.

2. Vessels owned by persons who have residence in the Empire.

3. A vessel, the ownership of which has been transferred before the war but in expectation of its outbreak or during the war by a person who has residence in the Empire to a person who has residence in a neutral State, unless there is proof of a bona fide and complete transfer of the ownership of the vessel.

In case the ownership of a vessel is transferred during its voyage, and its delivery is not effected, such transfer shall not be considered as bona fide and complete.

ART. VIII. The national character of a cargo shall be decided by the national character of the owner.

ART. IX. In the following cases the cargo shall be considered enemy property, in spite of the above regulations:

1. A cargo consigned before the war but in expectation of its outbreak or during the war by a person who has residence in the Empire or in a neutral State or by his representative to the enemy State or to a subject of the enemy State or to his representative.

2. A cargo, the ownership of which has been transferred before the war but in expectation of its outbreak or during the war by the enemy State or its subject to a person who has a residence in the Empire or in a neutral State, unless there is proof of full and bona fide transfer.

In case the ownership of a cargo is transferred during a voyage, and actual delivery is not effected, such transfer shall not be considered bona fide and full.

ART. X. Concerning matters not provided for in the law, treaties, and these regulations, the rules of international law shall be applied.

CHAPTER II.—*Contraband persons, papers, and goods.*

ART. XI. Contraband persons are the enemy's military men and others who are being transported to be employed for hostile purposes.

ART. XII. Contraband papers are all official correspondence of the officers of the enemy's Government.

Official correspondence between the enemy's Government and its ministers and consuls residing in neutral States, and official correspondence between the enemy's Government and the Government of neutral States are not, however, contraband.

ART. XIII. The following goods are contraband of war when they are destined to the enemy's territory or to the enemy's army or navy:

Arms, ammunition, explosives, and materials (including also lead, saltpeter, sulphur, etc.), and machines for manufacturing them, cement, uniforms and equipment for army and navy, armor plates, materials for building ships and their equipments, and all articles to be used solely for hostile purposes.

ART. XIV. The following goods are contraband of war in case they are destined to the enemy's army or navy, or in case they are destined to the enemy's territory and from the landing place it can be inferred that they are intended for military purposes:

Provisions and drinks, *clothing and materials for clothing,*[a] horses, harnesses, fodder, wheeled vehicles, coal, and *other kinds of fuel,*[a] timber, currency, gold and silver bullion, materials for telegraph, telephone, and railroad.

ART. XV. The destination of a vessel is generally considered as also the destination of her cargo.

ART. XVI. In case a vessel is bound for a place not in the enemy's territory, but if her intermediate port of call is an enemy's port, or in case there is reason to believe the vessel is to meet enemy's ships during the voyage, the destination of such vessels shall be considered as enemy's territory.

ART. XVII. If a vessel bound for a port not in the enemy's territory carries a cargo which there is reason to believe is to be transported to the enemy's territory, such voyage shall be considered as continuous and the ship as destined to the enemy's territory from the first, whether she arrive at the port and land her cargo or not.

ART. XVIII. Of the goods mentioned in Articles XIII and XIV, if it is clear from their quantity and quality that they are intended for the vessel's own use. such goods shall not be considered contraband of war.

ART. XIX. If any vessel is suspected to have in her cargo contraband of war the captain of the war vessel shall inspect the bill of lading, clearance, and other papers, interrogate the crew of the vessel, and ascertain her destination.

CHAPTER III.—*Ship's papers.*

ART. XX. Ship's papers generally consist of the following documents:

1. *Certificate of nationality of the vessel.*—This document is a certificate issued by the register officer of the port where the vessel is registered, and generally contains the name and tonnage of the vessel, the name of the master, details of how the vessel came into the possession of the present owner, and the name, nationality, etc., of the registered owner.

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[a] The words in italics were added to the Regulations by an amendment of February 9, 1905.

2. *Passport.*—This document is a demand issued by the government of the country to which the vessel belongs, that the vessel with her crew, passengers, goods, and merchandise shall be allowed free passage without any hindrance, and generally contains the name and residence of the master, the name, construction, and destination of the vessel.

3. *Permit for navigation.*—This document is issued by the officers of the port where the vessel fitted out for the voyage, and gives her the right to navigate, carrying the flag and passport of the country to which she belongs. The document generally contains the nature, quantity, and owner of the cargo, and the place of destination.

4. *Charter party.*—This is a contract entered into by the owner or master of a vessel and the person who charters her concerning the hire of the whole or part of the vessel, and generally contains the name of the master, the name and construction of the vessel, the port where she is lying when chartered, the name and residence of the person who chartered her, the nature of the cargo, the ports where it is to be loaded and unloaded, and the freightage.

5. *Log book.*—This is a journal kept by the master of the vessel in accordance with the regulations of the country to which she belongs.

6. *Ship's journal.*—This is a journal kept by the master of the vessel to make report to her owner.

7. *Contract with the shipbuilder.*—This document must be carried by a vessel while there is no change in ownership since her completion, and is used to prove her nationality in case there is no passport, permit for navigation, or certificate of nationality.

8. *Assignment.*—This document proves that the ownership of a vessel has been transferred to the purchaser.

9. *Bills of lading.*—These are generally made separately for goods of different shippers. Those remaining on board are duplicates of those which the master has given to the shippers. A bill of lading contains the name of the shipper, date and place of loading, the name and destination of the vessel, the nature, quantity, destination, and freightage of the goods.

10. *Invoice.*—An invoice always accompanies goods and contains details of each bale of goods, the price, freightage, custom duty, and other charges and expenses, and the names and residences of the consignor and consignee.

11. *Freight list.*—This contains the names of the consignor and consignee, the mark and number of each bale, quantity of goods in each bale in detail, and accounts of freightage corresponding to the bill of lading, and signed generally by an agent who manages clearance of vessels, and by the master.

12. *Clearance.*—This is issued by the officer of the custom-house which the vessel left last, and proves that the custom duty has been paid. It also contains the destination of the vessel and her cargo.

13. *Muster roll.*—This contains the names of the crew, with their ages, duties, residences, and places of birth.

14. *Shipping papers.*—This is a contract signed by every member of of the crew, with details of the limits of the voyage and the period of hire contracted.

15. *Bill of health.*—This is a certificate testifying that there has been no contagious disease prevailing in the port which the vessel left and that there has been no case of such disease on board the vessel.

Chapter IV.—*Blockade.*

Art. XXI. Blockade is to close an enemy's port, bay, or coast with force, and is effective when the force is strong enough to threaten any vessels that attempt to go in or out of the blockaded port or bay or to approach the blockaded coast.

Temporary evacuation of a blockaded area by a squadron or man-of-war on account of bad weather or to attain the object of the blockade does not interfere with the effectiveness of the blockade.

Art. XXII. When a blockade is instituted the commanding officer of the squadron or man-of-war shall issue a declaration of blockade by filling out Form I with the area of blockade and the date of the declaration.

Art. XXIII. When enforcing a new blockade after former blockade has lost its effectiveness, or when there is change in the area of blockade, a new declaration must be made according to the preceding article.

Art. XXIV. When the commanding officer of a squadron or a man-of-war declares a blockade, he shall take the following steps:

1. He shall report the declaration of the blockade to the minister of the navy.

2. He shall report the declaration of the blockade to every Japanese minister residing in the countries near the blockaded area, and shall request him to inform the Government of the country and all the foreign ministers and consuls residing in the country to which he is accredited of the establishment of the blockade.

3. He shall communicate the declaration of the blockade to all the foreign consuls residing in neutral districts in the neighborhood of the blockaded area, and shall take any other measures necessary to make known the fact of the blockade.

4. He shall inform as far as possible, by means of a flag of truce, the proper officers and consuls of neutral countries residing within the blockaded area, of the declaration of the blockade.

Art. XXV. In case the master of a vessel receives warning direct from an imperial war vessel, or it is clear that he knows of the existence of the blockade from official or private information or from any other source, such master shall be considered to have received actual notice of the blockade.

Art. XXVI. In the following cases it shall be deemed that notice of the declaration of the blockade has been received:

1. The case in which the master of a vessel is considered to have received a notice of the blockade whether he has actually received it

or not, such notice having been sent to the proper authorities of the country to which the vessel belongs, and there having elapsed a sufficient time for the authorities to notify the residents of their nationality.

2. The case in which the master of a vessel is considered to have received a notice of the blockade, the fact of the blockade having been made public.

ART. XXVII. The following vessels shall be considered to have broken through a blockade outward:

1. A vessel that has issued out of the blockaded area or has attempted to do so.

2. A vessel that has transshipped outside the blockaded area the cargo of a vessel that has broken through a blockade outward, or has attempted to make such transshipment.

ART. XXVIII. In any of the following cases the preceding article shall not be applied:

1. When a vessel comes out of the blockade area, having a permit from the Imperial Government or from the commanding officer of the squadron or war vessel on duty of blockade.

2. When a vessel which entered the blockaded port during the existence of the blockade, having received no notice of the fact, sails out of the port without any cargo.

3. When a vessel which was in the port at the time of the declaration of the blockade sails out of the port without any cargo.

4. When a vessel which was in the port and was loaded before the declaration of the blockade sails out.

ART. XXIX. Any vessel which has received notification of a blockade shall be considered to have violated the blockade inward in the following cases:

1. When such vessel has passed into the blockaded area or has attempted to do so.

2. When such vessel, lying in the neighborhood of the blockaded area, is considered to be steering into the area, no matter what port of destination is mentioned in the ship's papers.

3. When such vessel has transported or attempted to transport cargo to a blockaded place, by transshipping to another vessel outside of the blockaded area in order that the latter may pass the line of blockade.

4. When such vessel is bound for the blockaded port.

ART. XXX. To vessels coming under one of the following heads, the preceding article shall not apply:

1. When a vessel has permission of the Imperial Government or of the commanding officer of the blockading squadron or man-of-war.

2. When the master of the vessel has ventured to make a blockaded port his destination anticipating termination of the blockade and intending to steer for another port in case the blockade is still in force, or when there are extenuating circumstances and the vessel comes from a very distant place.

3. When it is clear that the master of a vessel bound for a blockaded port has abandoned the idea of reaching that port.

4. When a vessel enters a blockaded area, it having become necessary to put into port from want of provisions, rough weather, or any other unavoidable circumstances, and there being no other port or bay to put in.

ART. XXXI. When a blockade is discontinued the commanding officer of the squadron or the man-of-war shall immediately report it to the minister of the navy and shall take necessary steps to make it generally known.

CHAPTER V.—*Visit, search, and capture.*

ART. XXXII. Any private vessel regarding which there is suspicion which would justify her capture shall be visited and searched no matter of what national character she is.

ART. XXXIII. A neutral vessel under convoy of a war vessel of her country shall not be visited nor searched if the commanding officer of the convoying war vessel presents a declaration signed by himself stating that there is on board the vessel no person, document, or goods that are contraband of war, and that all the ship's papers are perfect, and stating also the last port which the vessel left and her destination. In case of grave suspicion, however, this rule does not apply.

ART. XXXIV. In visiting or searching a neutral mail ship if the mail officer of the neutral country on board the ship swears in a written document that there are no contraband papers in certain mail bags those mail bags shall not be searched. In case of grave suspicion, however, this rule does not apply.

ART. XXXV. All enemy vessels shall be captured. Vessels belonging to one of the following categories, however, shall be exempted from capture if it is clear that they are employed solely for the industry or undertaking for which they are intended:

1. Vessels employed for coast fishery.

2. Vessels making voyage for scientific, philanthropic, or religious purposes.

3. Light-house vessels and tenders.

4. Vessels employed for exchange of prisoners.

ART. XXXVI. Any vessel of the Empire which carries on commerce with the enemy state or its subjects or makes voyage with such intention shall be captured, unless such vessel has no knowledge of the outbreak of war or has permission from the Imperial Government.

ART. XXXVII. Any vessel that comes under one of the following categories shall be captured, no matter of what national character it is:

1. Vessels that carry persons, papers, or goods that are contraband of war.

2. Vessels that carry no ship's papers, or have willfully mutilated or thrown them away, or hidden them, or that produce false papers.

3. Vessels that have violated a blockade,

4. Vessels that are deemed to have been fitted out for the enemy's military service.

5. Vessels that engage in scouting or carry information in the interest of the enemy, or are deemed clearly guilty of any other act to assist the enemy.

6. Vessels that oppose visitation or search.

7. Vessels voyaging under the convoy of an enemy's man-of-war.

ART. XXXVIII. Vessels carrying contraband persons, papers, or goods, but which do not know the outbreak of war shall be exempt from capture.

The fact that the master of a vessel does not know the persons, papers, or goods on board to be contraband of war, or that he took them on board under compulsion, shall not exempt the vessel from capture.

ART. XXXIX. Vessels that come under one of the following cases may be captured no matter of what national character they are:

1. When a vessel does not produce the necessary papers or they are not kept in good order.

2. When there are contradictions among the ship's papers or between the statements of the master and the ship's papers.

3. Besides the above two cases, when as the result of visitation or search there is sufficient suspicion to justify capture according to articles from XXXV to XXXVII.

CHAPTER VI.—*Disposition of captured vessels and their cargo and persons on board.*

ART. XL. Enemy vessels shall be forfeited.

Of the cargo on board, mentioned in the above clause, enemy goods shall be forfeited. In case of an armed vessel, however, the whole cargo shall be forfeited.

ART. XLI. Japanese vessels which carry on commerce with the enemy state or its subjects or which are making voyage with such intention shall be forfeited.

Of the cargo on board the vessels mentioned in the above clause, all the goods owned by the owners of the vessels and all the enemy goods shall be forfeited.

ART. XLII. Contraband persons shall be made prisoners and contraband papers shall be forfeited.

Any vessel carrying contraband persons or papers and the goods on board which belong to the owner of such vessel, shall be forfeited, unless the captain proves that not by his own fault he is unacquainted with the fact.

ART. XLIII. Contraband goods and all goods on board belonging to the owner of the contraband shall be forfeited.

When the owner of a vessel carrying contraband is also the owner of the contraband goods, the vessel shall be forfeited.

ART. XLIV. A vessel which has taken in contraband goods, using deceitful means, and all the goods on board belonging to the owner of such vessel, shall be forfeited.

ART. XLV. A vessel that has broken through a blockade and her cargo shall be forfeited. If the owner of the cargo proves that he is innocent of such breach of blockade, such cargo shall be released.

ART. XLVI. Vessels that are recognized to have been fitted out for the enemy for military purposes, and the goods belonging to the owners of such vessels, shall be confiscated.

ART. XLVII. Vessels ascertained to have scouted or carried information to give benefit to the enemy or to have done any other acts to assist him, and all goods belonging to the owners of such vessels, shall be confiscated.

ART. XLVIII. Vessels that have opposed visit or search, and all the goods belonging to the owners of such vessels, shall be forfeited.

ART. XLIX. Vessels voyaging under convoy of the enemy's men-of-war, and all goods belonging to the owners of such vessels, shall be forfeited.

ART. L. The masters and crews of enemy's merchant vessels may be made prisoners.

Passengers, and the master and crew of a vessel not enemy, shall not be made prisoners. In case it is necessary to call them as witnesses they may be detained.

CHAPTER VII.—*Procedure in capturing vessels.*

ART. LI. In visiting or searching a vessel the captain of the man-of-war shall take care not to divert her from her original course more than necessary and as far as possible not to give her inconvenience.

ART. LII. The captain of an Imperial man-of-war may chase a vessel without hoisting the ensign of the Imperial navy or under false colors. But before giving the vessel the order to stop he must display the ensign of the Imperial navy.

ART. LIII. The captain of an Imperial man-of-war shall in no case order the vessel to be visited or searched to send to his ship her boat, crew, or papers.

ART. LIV. The captain of the man-of-war shall first communicate by signal flag or steam whistle his intention to visit the vessel. At night he shall display a white light above the ensign in place of the signal flag.

In case it is impossible on account of bad weather to communicate his intention by any of the means mentioned above, or in case the vessel does not make any response to the above signals, he shall give order to stop by firing two blank cartridges, and if there is further necessity, by firing a shot ahead of the vessel.

If after giving the above warning the vessel still fails to obey the order to stop, fire shall be directed first at the yards and then at her hull.

ART. LV. On the vessel's stopping, the captain of the man-of-war shall send a boat to her with a boarding officer and his assistant.

The crew of the boat shall not wear arms but they may be kept in the boat.

When boarding the vessel the boarding officer may take with him, if he deems it necessary, not more than two of the boat's crew.

ART. LVI. The boarding officer, if he has ground for suspicion, shall demand with proper courtesy to inspect the ship's papers. When the master of the vessel refuses to produce them, the boarding officer may insist upon it.

ART. LVII. When the boarding officer deems, after inspecting the papers, that the vessel is not to be captured, she shall be released at once by order of the captain of the man-of-war.

ART. LVIII. When the boarding officer, after inspecting the papers, deems the vessel to be suspicious, he shall search her.

In this case he may, if he deems it necessary, call the crew of the boat on board to assist, or he may ask for assistance from the ship from which he was sent.

ART. LIX. Search shall be made together with the master of the vessel or his representative.

ART. LX. The boarding officer shall require the master of the vessel or his representative to open any locked place or furniture, and if the latter refuses to comply the boarding officer may take steps required for the occasion.

ART. LXI. The boarding officer if he finds, while making search, that there is no ground for capturing the vessel shall discontinue the search, and the vessel shall be released at once by the order of the captain of the man-of-war.

ART. LXII. The boarding officer, before he leaves the vessel, shall ask the master whether he has any complaint regarding the procedure of visiting or searching, or any other points, and if the master makes any complaint he shall request him to produce them in writing.

ART. LXIII. The boarding officer shall enter in the log book of the vessel when and where the visit or search was made, the name of the man-of-war from which he was sent, and the name and rank of her captain, and shall sign his own name and rank.

ART. LXIV. When a vessel is to be released on the ground that she has not received notification of blockade, or as coming under section 2 of Article XXX, or as not knowing the outbreak of the war under Articles XXXVI or XXXVIII, the boarding officer shall enter a warning according to Forms II or III in the vessel's log book or upon the paper certifying her nationality, and shall order the vessel to retrace or to change her course, or take any other proper measure.

ART. LXV. After visit and search has been made, if the captain of the man-of-war still has suspicion of the vessel, he shall order the boarding officer to hear the explanation of her master, and if after these explanations there still appear to be grounds for capturing her, such vessel shall be captured.

ART. LXVI. In deciding whether a vessel is to be captured or not, the nature of the vessel, her equipments, cargo, and papers, the master and crew and their testimony, etc., shall be taken into consideration.

ART. LXVII. If the captain of the man-of-war decides to capture a vessel he shall inform her master of the reason, and shall take possession of the vessel by sending one officer and the required number of petty officers and men. If on account of bad weather or any other cause it is impossible to dispatch these officers and men, the captain of the man-of-war shall order the vessel to haul down her colors and to steer according to his direction. If the vessel does not obey the orders of the captain of the man-of-war, he may take any measures required for the occasion.

ART. LXVIII. When a mail steamer is captured, mail bags considered to be harmless shall be taken out of the ship without breaking the seal, and steps shall be taken quickly to send them to their destination at the earliest date.

ART. LXIX. The captain of the man-of-war shall land at a convenient port when possible all the passengers of a captured vessel, except those who are deemed to be contraband persons or those who must be detained as witnesses.

ART. LXX. If the captain of a man-of-war, after capturing a vessel, ascertains that the capture was unlawful, he shall instantly release her.

ART. LXXI. The captain of a man-of-war shall cause due notes to be entered in the log book of his ship concerning a visit, search, or capture.

ART. LXXII. The captain of a man-of-war shall immediately submit to the minister of the navy detailed accounts of visit, search, or capture, with his opinions.

ART. LXXIII. When the captain of a man-of-war recaptures a Japanese or a neutral vessel captured by the enemy, he may release her if she has not yet been taken into an enemy port or has not been used for military purposes.

CHAPTER VIII.—*Procedure after capture.*

ART. LXXIV. When a vessel has been taken possession of, the captain of the man-of-war shall seize the documents concerning the vessel and her cargo and all other documents on board; arrange, number, and seal them; and the master of the vessel and the captain of the man-of-war shall sign on them; and a certificate prepared according to Form IV shall be attached.

The certificate of the above clause is generally made by the officer who received or found the documents.

ART. LXXV. When documents are found which have been mutilated or thrown away or hidden, the captain of the man-of-war shall deal with them according to the preceding article; but in this case the certificate shall be according to Form V.

ART. LXXVI. The captain of the man-of-war shall prepare in duplicate a certificate as to money, negotiable notes, and other valuables on board the vessel, and shall give one copy to the master of the vessel.

ART. LXXVII. The captain of the man-of-war shall, so far as possible, close and seal the holds of the captured vessel and shall take care to prevent embezzlement of any cargo, furniture, or any other things on board.

ART. LXXVIII. The captain and the officers of the man-of-war shall treat with proper courtesy the master and crew of the captured vessel and those who are to be made prisoners, and shall pay proper attention to the protection of their personal effects. Those who are to be made prisoners may be kept under restraint as required, but other persons on board shall not be restrained, unless there is a special reason.

ART. LXXIX. The captain of the man-of-war shall send on board the captured vessel a prize officer and the requisite number of petty officers and men, and shall send the vessel and her cargo to a port where there is an Imperial prize court or to a Japanese port in the neighborhood of such port.

ART. LXXX. The captain of the man-of-war may request the master and crew of the captured vessel to assist in navigating the vessel under the direction of the prize officer; and in case such request is not complied with, he may insist upon it.

ART. LXXXI. The captain of the man-of-war shall send into port on board the captured vessel the master and crew, and all the cargo and certificates, and the ship's papers, so far as possible in the same condition in which they were found at the time of capture.

The captain of the man-of-war, when he thinks it necessary, shall send an officer who can testify to the circumstances of the capture.

ART. LXXXII. When the captain of the man-of-war thinks that it is not proper to send in the captured vessel, the master, and the whole crew, he shall send at least three or four principal members of the crew as witnesses, and two of them shall be selected from the master, chief purser, mates, and chief seaman.

That part of the crew taken to another vessel shall be sent without delay to the port where the captured vessel has been sent.

ART. LXXXIII. In the case of the preceding article, the captain of the man-of-war shall order the prize officer to prepare a certificate according to Form VII, stating that part of the crew taken to another vessel and the reason for it.

ART. LXXXIV. When there are among the cargo of a captured vessel any goods that putrify easily or are not adapted for transportation, the captain of the man-of-war shall appoint a board from among the officers of the ship who are qualified for such work, and shall order them to submit a report.

The substance of such investigation shall be entered in the log book.

ART. LXXXV. When the board reports that there are among the cargo goods that are not adapted for transportation, the captain of the

man-of-war shall sell such goods at the nearest Japanese port, or at a neutral port, if permission is obtained from the authorities of the neutral State. Any goods that are not salable may be disposed of as seems best.

ART. LXXXVI. Before putting up such goods for sale the captain of the man-of-war shall select the most competent appraisers possible and shall have the whole of the cargo, or that part of it which is to be sold, appraised in writing.

Such sale, when possible, shall be made by auction, in the presence of the prize officer and a Japanese consul, if convenient, or any other Japanese officer lying near the place where the sale is to be made.

ART. LXXXVII. The captain of the man-of-war shall order the prize officer to prepare a certificate according to Form VIII, concerning the procedure of the sale, and shall send the certificate, accompanied by the report of the board of survey, appraisements, accounts of the sale, and other documents, together with the vessel.

ART. LXXXVIII. When the captain of a man-of-war deems a captured vessel unfit to be sent into port as above prescribed, he shall appoint from among the officers a competent board to investigate the matter and direct them to submit a report.

The gist of their report shall be entered in the log book.

ART. LXXXIX. If the board reports that the captured vessel is unfit to be sent into port as prescribed, the captain of the man-of-war shall send the vessel to the nearest Japanese port or the nearest neutral port, with the consent of the neutral authorities.

ART. XC. In the case of the preceding article the captain of the man-of-war shall order the prize officer to prepare a certificate according to Form IX, in which the circumstances of sending the vessel to the nearest Japanese port or to the nearest neutral port shall be stated in detail, and the captain shall order the prize officer to send this certificate, accompanied by the report of the board, and the witnesses, ship's papers, and any other documents required for judicial examination, to the nearest Imperial prize court.

ART. XCI. In the following cases, and when it is unavoidable, the captain of the man-of-war may destroy a captured vessel or dispose of her according to the exigency of the occasion. But before so destroying or disposing of her he shall transship all persons on board, and as far as possible the cargo also, and shall preserve the ship's papers and all other documents required for judicial examination:

1. When the captured vessel is in very bad condition, and can not be navigated on account of the heavy sea.

2. When there is apprehension that the vessel may be recaptured by the enemy.

3. When the man-of-war can not man the prize without so reducing her own complement as to endanger her safety.

ART. XCII. In the cases of the above article the captain of the man-of-war shall direct the prize officer to prepare a certificate stating the circumstances of inability to send in the prize and the details of

her disposal, and to send it to the nearest prize court, together with persons and cargo removed from the vessel, the ship's papers, and all other documents required for judicial examination.

ART. XCIII. A prize officer, when ordered to take possession of a captured vessel, shall prepare an inventory according to Form X of the stores, furniture, and cargo, so far as it can be ascertained without disturbing the stowage. In preparing this inventory the prize officer may request assistance of the master of the vessel, and shall give him a copy of the inventory signed by himself.

ART. XCIV. The prize officer shall keep a journal in which he shall enter events concerning the vessel, cargo, and persons on board.

ART. XCV. When a prize officer, while in charge of a captured vessel, receives any new documents or finds or picks up those mutilated or thrown away or hidden, he shall put them in order, number them, and affix to them a certificate prepared according to Form XI.

ART. XCVI. The prize officer shall pay the greatest attention to navigating captured vessel, and shall endeavor not to cause any damage to the vessel or her cargo.

ART. XCVII. The prize officer may land or transship the persons and cargo on board the captured vessel, but only in case of pressing necessity. In this case he shall prepare a certificate according to Form XII, stating the persons and goods landed or transshipped and the reason for such action. The persons and goods landed or transshipped shall be sent without delay by the most convenient means to the Imperial prize court.

ART. XCVIII. The prize officer, when he arrives at the place of destination, shall deliver the captured vessel to the prize court and shall make a request for examination.

FORMS.

FORM I. (Referred to in Article XLVII.)

DECLARATION OF BLOCKADE.

I hereby declare that on the .... day of ..... last the ....., from ....., in latitude ....., longitude ....., to ....., in latitude ....., longitude ....., were placed in a state of blockade by a competent force of His Imperial Japanese Majesty's ships, and are now in such state of blockade; and that all measures authorized by the law of nations and the respective treaties between the Empire of Japan and the different neutral powers will be enforced on behalf of His Imperial Japanese Majesty's Government against all vessels which may attempt to violate the blockade.

Given on board His Imperial Japanese Majesty's ship ..... at ..... this .... day of ....., 19...

Signed ....,

Commander in Chief (Admiral in Command) of ..... Squadron.

FORM II. (Referred to in Article LXIV.)

WARNING OF BLOCKADE.

I have visited the ..... vessel, the ....., this day by the order of Captain ....., of His Imperial Japanese Majesty's ship, ..., and warned that ....., from ....., in latitude ....., longitude ....., to ....., in latitude ....., longitude ....., is under blockade.

Dated this ..... day of ....., 190...

Latitude ....., longitude .....

....,

His Imperial Japanese Majesty's Ship .....

FORM III. (Referred to in Article LXIV.)

WARNING OF HOSTILITIES.

I have visited the ..... vessel, the ....., this day by the order of Captain ....., of His Imperial Majesty's ship ..... and warned that the state of war has existed and exists between the Empire of Japan and the Empire of .....

Dated this .... day of ....., 190...

Latitude ....., Longitude .....

....,

His Imperial Japanese Majesty's Ship .....

FORM IV. (Referred to in Article LXXIV.)

CERTIFICATE CONCERNING SHIP'S PAPERS RECEIVED AT THE TIME OF THE CAPTURE OF THE VESSEL.

Name of the vessel ..... Name of the master ..... I hereby certify:

1. That I was present when His Imperial Japanese Majesty's ship ..... captured the above-mentioned vessel on the .... day of ....., 190...

2. That the documents attached, that is, from No. .... to No. .... are all the papers found on board and received at the time of the capture.

3. That they are exactly in the same condition in which they were received, and no change has been made except that they received their numbers.

Dated this .... day of ....., 190...

....,

His Imperial Majesty's Ship .....

FORM V. (Referred to in Article LXXV.)

CERTIFICATE CONCERNING PAPERS THROWN AWAY (MUTILATED OR THROWN AWAY OR HIDDEN) AT THE TIME OF THE CAPTURE.

Name of the vessel, ... Name of the master, ... I hereby certify:

1. That I was present when His Imperial Japanese Majesty's ship ..... captured the above-mentioned vessel on the .... day of ....., 190...

2. That .... minutes before the capture (or .....), I actually saw at such and such place .... bundles of papers thrown away from a porthole of the above-mentioned vessel; I lowered the boat instantly; and the boat's crew picked up .... bundles of the papers, the other having gone to the bottom (in case papers are mutilated or hidden, state the circumstances.)

3. That the papers attached, that is, from No. 1 to No. .... are all the documents picked up at that time, and except they received their numbers they are in the same condition in which they were found, and no change has been made in them.

Dated this .... day of ....., 19...

....

His Imperial Majesty's Ship .....

FORM VI. (Referred to in Article LXXVI.)

CERTIFICATE AS TO MONEY AND VALUABLES FOUND ON BOARD THE PRIZE.

The ...., master.

I, the undersigned, holding the rank of ..... in His Imperial Japanese Majesty's navy and commanding his Imperial Japanese Majesty's ship ....., do hereby certify that the following is a correct account of all moneys and valuables found on board the above-named vessel ..... detained by me as lawful prize of war on the .... day of ....., 19...

....

(Here state the several articles, distinguishing whether they were voluntarily given up or were found concealed, and where.)

....,

Commanding His Imperial Japanese Majesty's Ship.

NOTE.—I do hereby declare that on the .... day of ....., 19.., I delivered a copy, signed by myself, of the above certificate to the master of the ..... and that .....

(Here state whether or not the master made any objection, and if he did, what the nature of the objection was.)

Signed this .... day of ....., 190...

....,

Commanding His Imperial Japanese Majesty's ship .....

(A copy of this certificate must in all cases be delivered to the master.)

FORM VII. Referred to in Article LXXXIII.)

CERTIFICATE TO BE ISSUED WHEN THE CAPTAIN OF THE MAN-OF-WAR TRANSSHIPPED THE CREW OF A CAPTURED VESSEL TO ANOTHER VESSEL.

The ...., master.

I hereby certify,

1. That Captain ....., of His Imperial Japanese Majesty's ship ....., has captured the above-mentioned vessel on the .... day of ....., 19.., in longitude ....., latitude .....

2. That on the .... day of ....., 19.., the said Captain ..... had transshipped ..... of the crew before he sent the vessel to port where there is a prize court.

3. That the reasons for such transshipment of the crew are .....

Dated this .... day of ....., 19...

....,

His Imperial Japanese Majesty's ship ....., Prize Officer.

FORM VIII. (Referred to in Article LXXXVII.)

CERTIFICATE CONCERNING SALE OF CARGO.

The ...., master.

I hereby certify,

1. That Captain ....., of His Imperial Japanese Majesty's ship ....., has captured the above-mentioned vessel on the .... day of ....., 19.., in longitude ....., latitude .....

2. That on the .... day of ....., 19.., the captain ordered the survey of the cargo.

3. That the document (A) annexed is the report of the board of survey.

4. That as the result of the survey the captain ordered me to take the vessel to ..... port at once and to sell the cargo.

5. That on the .... day of ....., 19.., I transported the cargo to the above-mentioned port and ordered ..... and ....., who are most skillful appraisers, to appraise the goods.

6. That before appraising the above mentioned ..... and ..... swore that they would discharge their duties impartially, and the document (B) annexed are their written oath.

7. That the documents (C) annexed are the appraisement of ..... and .....

8. That on the .... day of ....., 19.., I gave order to sell the goods by auction, and the document (D) annexed is the advertisement made at .....

9. That on the .... day of ....., 19.., the auction advertised was held, and I (Japanese consul, or Japanese officer residing in the neighborhood of the place where the sale was made) was present and witnessed the sale.

10. That the document (E) annexed is the account of sale given me by ....., the goods having been sold to .....

11. That on the .... day of ....., 19.., I have turned over to ..... the sum of yen ....., mentioned in the accounts of sale.

Dated this .... day of ....., 19...

....,

His Imperial Japanese Majesty's ship ....., Prize Officer.

FORM IX. (Referred to in Article XC.)

CERTIFICATE TO BE ISSUED WHEN A CAPTURED VESSEL IS SENT TO A NEUTRAL PORT (THE NEAREST JAPANESE PORT).

The ...., master.

I hereby certify,

1. That Captain ....., of His Imperial Japanese Majesty's ship ....., has captured the above-mentioned vessel on the .... day of ....., 19.., in longitude ....., latitude .....

2. That on the .... day of ....., 19.., the said captain ordered survey of the vessel.

3. That the document (A) annexed is the report of the board of survey.

4. That as the result of the survey the captain ordered me to navigate the vessel to .....

5. That in accordance with the above order I reached ..... on the .... day of....., 19.., and turned over the vessel to .....

Dated this .... day of ....., 19...

....,

His Imperial Japanese Majesty's Ship ....., Prize Officer.

FORM X. (Referred to in Article XCIII.)

INVENTORY OF THE STORES, FURNITURE, AND CARGO OF THE PRIZE.

The ...., master.

I, ..., holding the rank of ..... in His Imperial Japanese Majesty's navy, and the prize officer in charge of the above-named vessel, do hereby certify that the following is a correct inventory of the stores, furniture, and cargo of the said vessel, so far as the said can be ascertained without disturbing the stowage .....

Signed this .... day of ....., 19...

....

NOTE.—I do hereby declare that on the .... day of ....., 19.., I delivered a copy, signed by myself, of the above inventory to the master of the ....., and that ..... (Here state whether or not

the master made any objection, and, if he did, what the nature of the objection was.)

Signed this .... day of ....., 19...

....

(A copy of this inventory must be delivered to the master.)

FORM XI. (Referred to in Article XCV.)

CERTIFICATE CONCERNING SHIP'S PAPERS RECEIVED (MUTILATED AND THROWN AWAY OR HIDDEN) DURING THE VOYAGE.

The ...., master.

I hereby certify:

1. That on the .... day of ....., 19.., I was ordered to navigate the above-mentioned vessel to ..... for adjudication.

2. That during the voyage, on the .... day of ....., 19.., I received from the master of the vessel the documents annexed—that is, from No. 1 to No. ..... (Here circumstances to be noted, if any. Same in the case of mutilation or concealment.)

3. That the above-mentioned documents are all the papers I have received, and they are in the same condition as when received and no change has been made in them, except that I numbered them.

Dated this .... day of ....., 19...

....,

His Imperial Japanese Majesty's Ship ....., Prize Officer.

FORM XII. (Referred to in Article XCVII.)

CERTIFICATE TO BE ISSUED WHEN THE CREW OR CARGO OF A CAPTURED VESSEL IS LANDED.

The ...., master.

I hereby certify:

1. That on the .... day of ....., 19.., I received order to navigate the above-mentioned vessel to ..... for adjudication.

2. That during the voyage I landed (transshipped) from the vessel the following:

....} Goods or persons landed (transshipped) and the place
....} where landed.

3. That the reasons for landing or transshipping are .....

Dated this .... day of ....., 19...

....,

His Imperial Japanese Majesty's Ship ....., Prize Officer.

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